FILED

No. 01-1271 FEB 26 2002

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IN THE

Supreme Court of the United States

KNIGHTS OF COLUMBUS, COUNCIL #94, LEXINGTON, MASSACHUSETTS; *et al.*,

Petitioners,

v.

TOWN OF LEXINGTON, *et al.*,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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February 27, 2002

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a facially content neutral regulation banning all unattended structures in a traditional public forum, the display of the crèche in this case, enacted and motivated in response to citizens who opposed the display, violated the free speech and free exercise rights of petitioners protected by the First and Fourteenth Amendment rights of petitioners.

(2) Whether a generalized fear by government that a public forum might be aesthetically damaged by the threatened displays of others, constituted a significant enough governmental interest to justify a ban on all unattended structures in a traditional public forum, or whether such governmental action violated petitioner's free speech and free exercise rights protected by the First and Fourteenth Amendments of the United States Constitution.

PARTIES TO THE PROCEEDING

The plaintiffs are the Knights of Columbus, Council #94, Lexington, Massachusetts and Michael J. O'Sullivan, who brings this action individually and as Grand Knight of the Knights of Columbus, Council #94, Lexington, Massachusetts.

The defendants are the Town of Lexington, the Board of Selectman of the Town of Lexington and the members of the Board of Selectmen: Jeanne K. Krieger, Catherine M.D. Abbott, Elizabeth B. Eddison, Peter D. Enrich, and Dawn E. Mckenna. The natural defendants are sued in their official capacities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the Knights of Columbus, Council #94, *et al*, respectfully pray that a *Writ of Certiorari* issue to review the decision entered by the United States Court of Appeals for the First Circuit, dated November 29, 2001 (App. 1a – 22a).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit upholding summary judgment for the respondents (App. 1a – 22a) is reported at 272 F.3d 25 (1st Cir. 2001). The Decision of the District Court is reproduced at App. 24a – 26a. The Report and Recommendation of the Magistrate is reproduced at App. 27a – 66a.

Additional decision in this case, which are not directly relevant to this petition are reported at: *Knights of Columbus v. Town of Lexington*, 138 F. Supp. 2d 136 (D.Mass. 2001) (Motion for protective order granted in part, denied in part); *Knights of Columbus v. Town of Lexington*, 124 F. Supp. 2d 119 (D.Mass. 2000) (denying petitioner's motion for a preliminary injunction).

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 2001. A rehearing *en banc* was not sought by either party. This Court has jurisdiction under 28 U.S.C. §1254(1).

Jurisdiction was appropriate in the Court of Appeals under 28 U.S.C. §1291 following the entry of a final judgment by the District Court. Jurisdiction in the District Court was proper under 28 U.S.C. §§1331 and 1343(a)(3)-(4).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Free Speech and Free Exercise Clauses of the First Amendment to the Constitution of the United States as applied to the states through the Fourteenth Amendment. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. CONST. amend. I.

The Town of Lexington's *Rules and Specifications Regulating the Use of the Battle Green* are too long to reproduce here and are included in the appendix at 16a – 22a (2000 amendments) and 67a – 70a (1986 version).

STATEMENT OF THE CASE

This case involves an amendment to the town's regulations governing the use of the Battle Green in Lexington Massachusetts, site of the opening battle of the American Revolution. The amendment was enacted to deal with the longstanding division within the Town over the presence of a privately owned crèche (Nativity Scene) on the Battle Green.

The Battle Green of Lexington is the former town common, deeded to the residents of Lexington as a place to construct their parish church/meetinghouse. The meetinghouse and its expansions were in use on the Green from 1692 to 1848. It was adjacent to the church/meetinghouse where the minutemen of Lexington gathered and fought on April 19, 1775 and where seven of them remain buried today, the first casualties of the American Revolutionary War.

The church/meetinghouse is now gone, replaced by a stone pulpit and bible marking its former location.

The Battle Green has remained a focal point of religious activity for the people of Lexington and the parties have agreed that the Green is a public forum. One form of religious worship practiced on the Battle Green since at least the beginning of the last century has been the placement of a crèche during the periods of Advent and the Epiphany, which make up the Christmas Season in the Christian tradition. The Town itself was once responsible for the maintenance and placement of the crèche, but in 1973, the Lexington Council of the Knights of Columbus and the Simon W. Robinson Lodge, Ancient Free and Accepted Masons, both fraternal Orders of Lexington, assumed the ownership interest of the crèche and its display on the Battle Green through 1999 with a plaque describing the crèche as a private display.

The Green has been used as a gathering place for the expression of all views: political, religious, personal, public, parades, foot races, weddings, military ceremonies conducted by military Chaplains, patriotic reenactments, sunrise services, prayer vigils, union protests, press conferences, Halloween parades, labor rallies, a diversity festival, Easter sunrise services, peace vigils, , reenlistment ceremonies, interfaith services, protests over the exclusion of the crèche, protests over the display of the crèche, and community bazaars.

In 1998 the placement of the crèche on the Green by the petitioners became a matter of public dispute. The widely publicized issue was addressed by a group formed by a committee of clergymen and laymen, the group was eventually called the "Meeting Ground". The Meeting Ground through its leader, Rev. Cohen, reported to the Selectmen their suggestions and recommendations as to the placement of the crèche on the Green, and in 1999 the Board of Selectmen permitted the crèche on the Green for a three week period.

Subsequent to the Board's decision to allow the three week display in 1999, it began receiving requests to allow a wide range of religious structures on the Green for comparable periods. The Meeting Ground again reported to the Selectmen, a public debate ensued, and on July 24, 2000, the Selectmen voted 4 to 1 to ban all unattended structures from the Green. It also made other modifications in the rules and regulations regarding the conduct of activities on the Battle Green.

On October 30, 2000, the Selectmen voted to deny the appellants a permit to display their crèche. The appellants sought preliminary injunctive relief against the defendants in their Complaint in the District Court, Docket No. 00-12360 N.G., in connection with the deprivation under color of law of the plaintiffs'

rights as guaranteed by the Constitution of the United States, particularly the First and Fourteenth Amendments to the Constitution of the United States. The action was also brought under Title 42 United States Code §1983. The jurisdiction of the Court was invoked pursuant to 28 U.S. C. §§ 1331, 1343(a)(3) and (4) and 2201. Supplemental jurisdiction was sought over all state claims. Venue was proper under 28 U.S.C. §1391(b), as the defendants were located in the District of Massachusetts and the cause of action arose in the District of Massachusetts.

After some discovery, cross motions for Summary Judgments were heard by Dein, U.S. M. J. and on August 7 2001, the Magistrate issued her report and recommendation on the cross motions for Summary Judgment.

The District Court Judge, Nancy Gertner, approved and affirmed the report of the magistrate and on November 29, 2001 entered Summary Judgment for the appellees and dismissed the case.

The appellants appealed through the United States Court of Appeals, First Circuit, Docket No. 01-2460, and on November 29, 2001, the Summary Judgment in the District Court was affirmed by the United States Court of Appeals for the First Circuit, rejecting the plaintiffs' claims that their right of free speech and free exercise were violated by the government..

REASONS FOR GRANTING THE WRIT

The right of free speech and free exercise in a traditional public forum was destroyed by a blatant content-based heckler's veto that was ratified by the Circuit Court of Appeals.

The court below, applying intermediate scrutiny, accepted at face value what was clearly pretextual and anecdotal reasoning, as sufficient justification to ban unattended structures in a public forum, that tar-

geted a nativity display in this case, whose message is centuries old and whose symbolism is inextricably intertwined with Petitioner's speech, central religious beliefs and longstanding public expression. The standard of review, because the vote was content based, should have been strict scrutiny.

The ruling succeeded in shielding government officials in the town of Lexington, Massachusetts from the discomfort and unpleasantness of standing up to a small but vocal band of hecklers whose principle weapon was a crude threat to flood the town with other display requests if the town did not relent. The court below created a new precedent that will enable other municipalities, using the same pretextual and anecdotal reasoning, to exclude a unique form of religious expression that has been traditionally displayed in public forums across our nation.

The First Circuit's broad application of its version of a "content neutral" template can now serve as a precedent to banish more than the religious expression and speech represented by devotional displays such as Petitioner's crèche. Other religious expressions, parades, processions and festivals, can be removed from the streets and parks of our nation by the simple expedient of enacting "facially content neutral" regulations.

Here, a complete genre and unique form of public worship has effectively been banned from the public square.

I. THE LOWER COURT ALLOWED A HECKLER'S VETO OF PETITIONER'S SPEECH IN A TRADITIONAL PUBLIC FORUM.

In response to a series of threats from vocal private individuals to flood the town of Lexington, Massachusetts with requests to erect numerous other displays on Lexington Green if the town did not remove the crèche from the Green, the town board adopted a

regulation of speech explicitly targeting the elimination of the crèche, even though the crèche had been displayed, unattended, during the period of the Advent to the Epiphany, for most of eighty years.[1] App. at 8a – 9a ("the Board proposed the regulation only after requests for permits for alternative religious displays began to sprout . . . Fearing a flood of applications and a corresponding cluttering of the Green, the Board devised a regulation prohibiting all unattended structures"). *Id.*[2]

The town board of Lexington, adopted a regulation on July 24, 2000 that 1. limited the eligibility for public expression on the Green to active events of less than eight hours; 2. restricted display of ceremonial structures to those that were "in connection with special events and limited in duration to the period required for such events; and 3. created an explicit prohibition against "placement on the Green of any unattended structure." App. at 32a – 33a.

The court below ruled that the town's action was "a far cry from an invidious singling-out of the crèche." *Id.*

Even a cursory review of the record below undermines such pronouncements.

In Lexington, Massachusetts it is no secret that the crèche has been a "source of friction within the town" for some years. App. at 3a.

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[1] In 1999 after meetings with clergy and citizens, the Knights of Columbus agreed to limit the display of the crèche to three weeks. App. at 4a.

[2] The town's motivation, purpose and intended effect of the regulation was to eliminate the crèche from the Green. "There is no question in the present case that the opposition to the crèche motivated the amendment to the regulations. . ." *Report and Recommendations on Cross Motions for Summary Judgment.* Magistrate Judith Gail Dein, U.S. Magistrate, August 7, 2001. App. 55a - 56a.

The court below described the atmosphere in 1999 as follows:

> "[The town] began receiving requests to allow a wide range of other religious structures on the Green for comparable periods. One group desired to place a sign near the crèche indicating some citizens' objections to its presence on public land. Other applicants requested permission for a display honoring witchcraft at Halloween and for the erection of a pyramid to honor the Egyptian Sun God Ra during the month of April. Yet another resident inquired about the possibility of erecting a Sukkah, an open hut-like structure, to commemorate the Jewish Harvest festival of Sukkoth."

App. at 4a.[3]

Town selectmen responded to the threats by adopting a new regulation specifically aimed at resolving the "problem" of the crèche. The Chairman of the

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[3] While the court below cited to a half dozen requests, the record below contained other requests and proposals that were not mentioned. For example: one suggestion was for the placement of a skeleton and a ghost, another sought "a depiction of human sacrifice in commemoration of the Mayan or Aztec religious festivals, which were oriented around blood letting"; another sought "a commemoration of the religious Crusaders, which included the burning of entire communities of Jews, and the sacking of Christian Constantinople"; still another sought "a statue of the late Flip Wilson, in honor of his "Church of What's Happening Now"; also, another proposal surfaced "for a heard of live cows" on the Green to honor the Hindu religion. Still another suggested that "[a]lternatively, the town could simply ban all unattended displays on the Battle Green. If anyone cares enough to stay up all night with their religious or political displays for four weeks, maybe we should let them have that opportunity. But having people shove their fetishes in our faces and then walk away is just too much." Exhibit K, L: Appendix in Support of Defendant's *Motion for Summary Judgment.*

Board of Selectmen for the town, speaking for the Board, without contradiction, stated:

> "At our meeting on July 10th, we directed the town counselor to recommend changes in the bylaws to eliminate freestanding, unattended structures on the Battle Green. This directive was the culmination of a process initiated by the Board nearly two years ago to bring closure to whether – to the issue of whether to continue to permit the placement of the crèche on the Green. . ."

Record Appendix, Vol. 2 at 412, Appeals Court, transcribed from town videotape of town's Board of Selectmen's meeting of July 24, 2000: *also*, response of the town to Pl. statement ¶20, Chairman Jeanne K Krieger, Board of Selectmen Meeting. Court of Appeals App. 414-415, pursuant to the town's response to plaintiffs statement of undisputed facts, pursuant to Rule 56.1 that were deemed admitted under local rule 56.1 for purposes of summary judgment.

> "The Board of Selectmen is acting on our personal convictions and what we as individuals believe represents the perspective of a majority of the citizens of Lexington. As one colleague said to me this weekend, there are many church going Christians, many long time residents of Lexington who recognize that times have changed and that the display of the crèche on the Green is no longer appropriate. I would hope that our discussion this evening will focus on the recommended changes in the by-laws and enhancement and the appropriateness of invoking what we believe to be the majority opinion of the Board, and the majority opinion of the residents of Lexington."

Id. at 414.

The court below justified the town's action, reasoning that the town was on the "horns of a dilemma" App. at 4a,.[4] Capitulation to threats of disruption from others is not content neutral. *See, Graynard v. City of Rockford*, 408 U.S. 104, 117 (1972). ([E]xpressive activity could not be prohibited because of a mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint." *See also, Forsyth County, Georgia v. Nationalist Socialist Movement*, 505 U.S. 123, 130-134 (1992). "Listeners' reaction to speech is not a content-neutral basis for regulation." *Id.* 134 (emphasis added). *See also, Boos v. Barry*, 485 U.S. 312, 322 (1988) (it would be inconsistent without "longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience"), *citing Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

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[4] Petitioners argue that there is no dilemma. The ban penalizes a substantial amount of protected speech by setting arbitrary time limits and banning the unattended display of the crèche during prescribed periods that are religiously significant to Christians. There was no offer to allow the petitioners use of a smaller or different portion of the Green, or to have the crèche on the Green for a reduced period of time as was previously agreed to by the town and petitioners. There has never been a complaint about the size of the display, or any complaint regarding the text of the sign identifying the crèche as a private display. The town's only suggestion was that private property near the Green might be a more appropriate site. App. at 12a n.5, 63a: Alternative Avenues of Communication. *Compare* this Court's treatment of unattended displays in *Clark v. Community for Creative Non Violence*, 468 U.S. 288 (1984). In Clark, the tents stayed up, while the conduct, sleeping and camping in the park, was prohibited. In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) this Court allowed the concert to occur but upheld a rule that the volume be turned down. In *United States v. Grace*, 461 U.S. 171 (1983). this Court invalidated a statute prohibiting leafleting and picketing adjoining Supreme Court building, but permitted such activity on the sidewalk. A total ban was not necessary to achieve this end.

The lower court reasoned, if the town allowed for the crèche, it would have to allow for all other competing applications. App. 9a. The lower court then agreed with the town that granting all applications "likely would compromise the aesthetic and historic elements of the Green." App. at 4a. The pretextual nature of this justification is clear from the record.[5]

The court below upheld the town's action, because it affected all unattended structures equally, regardless of the context or motivation that caused it to be enacted. The substantial state interest was served because the regulation was enacted, ostensibly, to preserve the "aesthetics" of the forum. App. 15a-16a. [Aesthetics issue addressed in Part II, *infra.*] Because of the stated purpose, the lower court concluded that the regulation was content neutral, and hence, a

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[5] "The minutes of the Board's meetings reveal a keen awareness that if it continued to allow a display of the crèche, many of these competing applications would have to be granted. . . . but granting them all likely would compromise the aesthetic and historic elements on the Green." App. at 4a. This statement by the court below is flatly contradicted by the affidavit of Peter Enrich, a member of the Board of Selectmen for the town. "The Board understood that some or all of these potential applications were not serious, and that the prospective applicants had no desire to actually erect such structures on the Green. However, the Board also realized that it nevertheless would be required to permit such displays on the Green if the Board granted a permit for the crèche." *Affidavit of Peter Enrich*, Record Appendix, Volume 1, Appeals Court, p.82. Selectman Enrich also characterized the plaintiff's religious display as a "majority religious symbol" that hurt the feelings of some residents and that some of the residents were alienated — that they 'didn't belong' and that the religious display was disenfranchising." Pl. local rule statement; 56.1 *Statement* 25. Statement of Undisputed Material Facts. Even if the court below misunderstood the seriousness of the requests, the town did not. The court below clearly abandoned its responsibility to strictly examine why a unique form of public religious expression was eliminated from a public forum. To cite to erogenous zoning cases and "concantations" of Establishment issues with no basis in the record demonstrates how sadly the First Amendment was observed in this case.

proper exercise of the town's regulatory powers. App. at 11a-12a ("we hold that the total ban on unattended structures is both content neutral and narrowly tailored to achieve a substantial governmental interest").

The court below was plainly wrong. Having announced that the regulation was content-neutral the court below said it didn't have to look further regarding the context within which it was enacted. But the context of the regulation was based entirely on the content of expression, the display of the crèche. The court below declined to apply the scrutiny required of such content based measures as articulated by this Court in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993). [Discussed, *infra.*] The actions of the court below amounted to ratifying a heckler's veto.

> "Because speech is often provocative and challenging, and may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea, freedom of speech, though not absolute is nevertheless protected against censorship, or punishment, unless shown to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."

Id., *citing* U.S. Constitution, Amend 1. *See also Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 761 (1995). *See, also, Tinker v. Des Moines*, 393 U.S. 503, 508-509 (1969).

A. Because the regulation was not content neutral and because it intruded on an eighty year tradition of speech and religious exercise, it deserved to be examined beyond its mere words.

Because it denominated the regulation as content neutral, the lower court applied intermediate scrutiny. App. at 9a, and its improper application of the *Capitol Square* decision, the court committed clear error. *Capitol Square*, 515 U.S. 761.[6]

Petitioners argue that the regulation was not content neutral, precisely because it was adopted to address "the problem" of the crèche, and because of this, strict scrutiny should have been the standard. "The strictest standards apply here." *Capitol Square*, 515 U.S. at 761. But regardless, the ban cannot withstand either intermediate or strict examination be-

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[6] The evident reliance of the court below on *Capitol Square*, 515 U.S. 753 (1995) as permitting a complete ban on unattended displays is misplaced. *Capitol Square* involved the placement of a Roman Cross adjacent to the state house in Columbus Ohio. The sole issue in the case was the Establishment Clause. In the judgment and other opinions, the Justices made a number of observations and qualification regarding the nature of the forum involved in the case. These discussions are informative. In the decision, Justice Scalia stated, "a ban on all unattended displays, which did not exist here, might be [a reasonable, content-neutral time, place, and manner restrictions]." *Id.* at 761; Justice Souter in his opinion *Id.* at 784, described such areas as "in forums around pubic buildings and "in the area around the seat of government."; Justice Stevens, in his dissent stated, "may impose a ban in such a forum" *Id.* at 803, and "in front if its seat of government" *Id.* at 806. Unlike the forum at issue in Capitol Square, the present case involves a traditional common, separate from the seat of government. Lexington Green is not comparable to the Plaza immediately adjacent to the lawn of a Capitol building. It is the situs of the complete spectrum of private, religious, political, military, patriotic, union and governmental speech.

cause it was impermissible state action in the form of a heckler's veto. [7]

The court below adopted mere speculation of what might occur as sufficient grounds to prohibit Petitioner's expressive activity, a standard never adopted by this Court.

Where free speech is concerned, it has been the rule that government not place undue burdens until after the speaker has spoken and some damage had been done. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 545 (1975).

There is no dispute in this case that the display of the crèche on Lexington Green is a free speech activity in a public forum. "[T]he town does not deny that the Knights have a free speech interest in exhibiting the crèche or that the Green is a public forum." App. 7a.[8] "The Free Speech Clause of the United States Constitution lies at the heart of the Knights' appeal." App. 6a.

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[7] Petitioners would also argue that the crèche is pure speech. "Thus where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply the test for fully protected expression." *Riley v. National Federation of the Blind*, 487 U.S. 781, 796 (1988).

[8] The lower court stated there was a concantation of Establishment Clause questions in this case. App. at 10a. The only Establishment clause issue identified in the record and in the decision of the court below are its conclusory statements of how the Establishment Clause is applied. App. 10a-12a, 15a. The selectmen's belief that allowing one religious display on the Green while disallowing all others would implicate the Establishment Clause was well founded. But that is not the case here. The Petitioners never asked that they be the only religious display on the Green. Nor can a serious argument be made regarding misattribution as the Knights continued to display the crèche with its identifying plaque.

Public places "historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered . . . public forums for such expressive activity." *Grace*, 461 U.S. at 177. The Lexington Green has been utilized by residents to communicate thoughts and ideas. Because of its historic usage, it cannot be regulated out of use for private displays, attended or unattended for anything but a compelling governmental interest – an interest that is absent in this case. Lexington Green is an exceptionally active forum where numerous types of speech and expressive activities occur.

The court below skirted the issue of motivation, purpose, and intended effect.

> "Relevant evidence [the court should have considered] includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body. These factors bear on the question of discriminatory object."

Church of the Lukumi Babalu Aye, 508 U.S. at 540 (internal citation omitted).

Because the lower court acknowledges, and the record of this case demonstrates, that the regulation was adopted in response to threats from third parties the decision of the court should not stand. "Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791.

In this case, the issue of the crèche being placed on the Green was discussed repeatedly at town board meetings. App. at 4a. It had been an issue since 1973.

It was a "problem", *Id.* In 1998 clergy and citizens with different viewpoints met to address the issues raised by those who objected to the display on the Green. An agreement was reached in 1999 to limit the period of display of the crèche to three weeks. When the Board agreed to a three-week display, a series of orchestrated requests began to sprout in the town.

Rather than treat each request separately, the town chose to ban all unattended structures, thus making the display of the crèche on the Green in all practicality an impossibility. The court below improperly concluded that it is "because they are now held to the same standard as all other similarly situated applicants." that they feel burdened. App. at 9a. The "all other similarly situated applicants" did not exist. Moreover it was acknowledged in affidavit that most, if not all the requests were not to be taken seriously. *Supra* at *fn* 4. The transparency of this rationale offered can be seen from the fact that it was not until 1999 that requests for permits began pouring in to the town.

The fact that the language of the regulation is facially neutral does not shield it as content neutral simply because the word "crèche" or "religion" is not mentioned.

> "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids' subtle departures from neutrality and covert suppression of particular religious beliefs. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. The Court must survey meticulously the circumstances of governmental categories to

> eliminate, as it were, religious gerrymandering."

Church of Lukumi Babalu Aye, 508 U.S. at 533 –534 (internal citations omitted).

In this case it is undisputed that the regulation was adopted in response to protests from third parties who, after eighty years, started threatening the town that if it didn't do something about the crèche, they would flood the town with requests to place similar structures on the Green

II. PRESERVATION OF THE AESTHETICS OF THE GREEN IS INSUFFICIENT GROUNDS TO PROHIBIT DISPLAYS THAT DO NOT DAMAGE THE GREEN.

As noted, *supra*, fn. 3, the challenged regulation was not adopted to address any detrimental use of the Green by petitioners. Nor was the regulation adopted out of any legitimate concern that the "historic" use of the Green would be compromised.[9] Nor is there any record of the Knights receiving favorable treatment over others. There were no others. There was no vote to dislodge the crèche from the Green until after the 1999 threats surfaced. Yet, aesthetics and historic usage, are the very two reasons given for the regulation. "[G]ranting [all permits] would compromise the aesthetic and historic elements of the Green." App. at 4a. This rationale used to ban all unattended struc-

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[9] "Plaintiffs do, with justification, take exception to the fact that the defendants are now arguing that the presence of an unattended expressive structure on the Green is incompatible with its historic use and destroys its aesthetic value. *See, e.g., Enrich Aff.* ¶¶31-34; *Kreiger Aff.* At ¶¶6,7. Since the crèche has been displayed on the Green for eighty years it is difficult to give credence to the defendant's present description of the harm that is likely to occur if the display is allowed to continue." *Report and Recommendations on Cross Motions for Summary Judgment.* Magistrate Judith Gail Dein, U.S. Magistrate, August 7, 2001. App. 60a.

tures was little more than speculative, based on future activity that may or may not have caused any damage.

A. The regulation, standing alone, touches on displays that are both communicative and non communicative, and serves no legitimate government interest as it was enacted in anticipation of aesthetic damage that was not in the record and may never occur.

The town's assertion that it was banning all unattended structures to preserve the aesthetic and historic use of the green, standing alone, touches both protected speech and non communicative displays such as bandstand seating for various events or a truck trailers that continue to be placed on the Green for days before events.

The evil the town ostensibly sought to eliminate: reduce clutter or prevent damage to the park, and preservation of historic use by banning all unattended structures has no basis in fact, since for eighty years the crèche has been displayed and there has been no damage to the park, and the crèche *is* part of the historic use. It has been deemed by the trial court to have done no harm during its 80 years on the Battle Green. App. 60a.

Moreover, a ban on all unattended displays does not include displays authorized by the town. The town has been unable to say exactly what it is about a private display that negatively affects the park that a town structure does not. Nor is it clear why an unattended display causes more damage than an attended display. A strong case, in fact, can be made that the act of erecting and disassembling a crèche daily for the three days suggested would be more destructive and unsightly than simply leaving it up for the period for which earlier permits had been issued.

The regulation is clearly not narrowly drawn and addresses no legitimate evil. *See, Ward*, 491 U.S. at 799 n.7 ("A ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate, whether they be fraud, crime, litter, traffic congestion, or noise. For that reason, a complete ban on handbilling would be substantially broader than necessary to achieve the interests justifying it" (internal citation omitted)) *See also, U.S. v. Grace, supra.*

Moreover, punishing speech and expressive activity of one party for fear that the town may have to clean litter, or maintain its public parks because of the damage that may be caused by others, has never been grounds to enact a regulation banning all unattended structures. There is simply no correlation between an unattended Nativity Scene and any damage that might occur, sufficient to warrant such a Draconian enactment.

B. Any legitimate governmental interest could have been achieved by far less intrusive measures, including waiting until threats to flood the town with permits actually materialized. The selectmen should have exercised their duty to issue permits in a responsible manner, applying "time, place and manner" considerations appropriately.

The legitimate governmental interest in preserving the aesthetic and historic use of the Green could have been met by a far less harsh rule, stopping far short of prohibiting the display of the crèche during the period requested. As noted *supra*, town officials doubted the legitimacy of the requests for usage that were offered by others.

It was wholly unjustified to ask the Petitioners to endure the burden of erecting and disassembling the

crèche daily and leaving it standing for no longer than eight hours, and further limiting their religious observances to three days, simply to mollify town dissidents. The court below should have applied strict scrutiny because of the conditions under which the regulation came about. "To survive strict scrutiny . . . a State must do more than assert a compelling state interest – it must demonstrate that its law is necessary to serve that interest." *Bursen v. Freeman*, 504 U.S. 191, 199 (1992).

Religious displays and free exercise of those beliefs in public places is to be revered. "Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square,* 515 U.S. at 760 (internal citations omitted).

"[P]articular expressive activity could not be prohibited because of a mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint." *Graynard*, 408 U.S. at 117. Yet, avoiding discomfort and unpleasantness was exactly the motivation for adopting the regulation as noted, *supra.* It was the "only" reason. There is not a single reference in the case below that the crèche negatively affected the aesthetics of the Green. The fact that the crèche has been displayed for eighty years makes it unmistakably clear that its display at Christmas is part of the historic usage of the Green.

The precedent established by this case can justify the homogenization of citizens' expression in public forums and eliminate unique cultural and religious displays or tableaus, such as the crèche in this case. It is constitutionally impermissible for government to deem what expression is "appropriate" nor is it proper for government to shape the form of citizens' expression in a public forum.

The Petitioners hereby respectfully submit that a *per se* ruling by this court that would apply "strict scrutiny" to any regulation of free speech in a traditional public forum be adopted.

CONCLUSION

Petitioners pray that certiorari will issue.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 01-2460

KNIGHTS OF COLUMBUS, COUNCIL #94, ET AL.,

Plaintiffs, Appellants,

v.

TOWN OF LEXINGTON ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nancy Gertner, U.S. District Judge]

Before

Selya and Lipez, Circuit Judges,

and Singal, District Judge.

Chester Darling, with whom Robert Roughsedge and Michael Williams were on brief, for appellants.

Jordana Glasgow, with whom Daryl Lapp and Palmer & Dodge, LLP were on brief, for appellees.

November 29, 2001.

SELYA, Circuit Judge. This appeal requires us to decide whether the Town of Lexington, Massachusetts (the Town) violated the First Amendment by adopting a regulation that bans unattended structures from the historic Battle Green. The plaintiffs allege that this regulation infringes their First Amendment rights and that the Town adopted it for an improper purpose, viz., to exclude the annual religious display of a crèche from the Battle Green. They also allege that, in all events, the Town's selective application of the regulation following its adoption renders it constitutionally infirm.

The district court found these charges unpersuasive and granted summary judgment in the Town's favor. We affirm: the record shows beyond hope of contradiction that the ban on unattended structures is a content-neutral restriction on the time, place, and manner of speech, narrowly tailored to achieve a significant governmental interest and framed so as to allow access to ample alternative avenues of communication. By the same token, there is no violation of the Free Exercise Clause because the regulation is a neutral law of general applicability. Lastly, the plaintiffs' claims of selective enforcement fail due to evidentiary insufficiency; the regulation was only intended to apply to private parties, and there is nothing in the record that shows preferential treatment in respect to any unattended structure erected by such a party.

I. BACKGROUND

The situs of this controversy is the historic Battle Green (the Green) — the very place where the first battle of the Revolutionary War occurred. Seven of the eight minutemen killed during the battle are buried there, and the Minuteman Statue — located at the apex of the Green — memorializes the American colonists who fought in the Revolutionary War. The

Green is a registered historic landmark, owned and maintained by the Town.

The Town's governing legislative body is the Board of Selectmen (the Board). The Board is entrusted with suzerainty over, and protection of, the Green. In the exercise of that function, the Board from time to time promulgates rules governing the use of the Green. Historically, these rules have allowed for a wide range of public uses, including recreational activities and activities involving the expression of political, religious, and other views. The rules divide activities on the Green into three categories: (1) allowed activities, (2) forbidden activities, and (3) activities for which a permit is required. To illustrate, picnicking in small groups is allowed as a matter of right; commercial solicitation is prohibited altogether; and rallies are allowed if a permit is first obtained (but otherwise are forbidden).

For most of the twentieth century, the crèche — a figurine representation of Christ's nativity in the stable at Bethlehem — appeared on the Green for roughly six weeks each year (in late November and December). For some thirty years, the Town had erected the crèche, disassembled it, and stored the components. In or around 1973, however, two fraternal organizations — the Knights of Columbus and the Masons — assumed responsibility for these tasks.

There is evidence that the display of the crèche long has been a source of friction within the Town, and that some residents complained bitterly about its presence on the Green. For the most part, however, the regulations, insofar as they pertained to the crèche at all, seem to have been honored more in the breach than in the observance. Despite the fact that the regulations have required a permit for a religious display of this type since at least 1982, no permit ever

was sought or demanded prior to the erection of the crèche in any year before 1999.

Beginning in the fall of 1998, the issue was repeatedly discussed at the Board's meetings. A group consisting of clergy and citizens with various viewpoints was formed to study the problem and suggest solutions. This committee reported to the Board on September 27, 1999. It unanimously concluded that "private citizens do have the right to have religious observances on the common land within guidelines established by the town," but suggested that a shortened display period might be a reasonable compromise. For the 1999 season, the owners of the crèche, including the Knights of Columbus, agreed to a display period of three weeks.

Subsequent to the Board's decision to allow the three-week display, it began receiving requests to allow a wide range of other religious structures on the Green for comparable periods. One group desired to place a sign near the crèche indicating some citizens' objections to its presence on public land. Other applicants requested permission for a display honoring witchcraft at Halloween and for the erection of a pyramid to honor the Egyptian Sun God Ra during the month of April. Yet another resident inquired about the possibility of erecting a Sukkah, an open hut-like structure, to commemorate the Jewish harvest festival of Sukkoth.

The minutes of the Board's meetings reveal a keen awareness that if it continued to allow a display of the crèche, many of these competing applications would have to be granted. The Board thus believed that it was on the horns of a dilemma: it could not constitutionally pick and choose among competing applications, but granting them all likely would compromise the aesthetic and historic elements of the Green. After seeking legal advice, the Board modified the rules governing use of the Green in several ways.

First, it limited permit eligibility for public expressions on the Green to active events of less than eight hours in duration. Second, it restricted displays of a ceremonial nature to those "in connection with special events and limited in duration to the period required for such events." Third, it added an explicit prohibition against "placement on the Green of any unattended structure." For ease in reference, we annex a copy of the regulation, as amended, as an appendix to this opinion.

On October 19, 2000, the Knights of Columbus and the organization's grand knight, Michael O'Sullivan (collectively, the Knights), applied for a permit to erect the crèche on the Green. The application was constructively denied, although the Board intimated that a one-day event that included the crèche would be approved.[1]

Dismayed by the new regulation and the concomitant ouster of the crèche, the Knights sued. Although they claimed abridgement of their free speech and free exercise rights, the district court refused to grant a preliminary injunction. Knights of Columbus v. Town of Lexington, 124 F. Supp. 2d 119 (D. Mass. 2000). We summarily affirmed that denial in an unpublished order.

In subsequent proceedings, the Knights attempted to show arbitrariness in the enforcement of the new regulation. They introduced evidence tending to prove that bleachers and a platform truck were left unattended on the Green for several days prior to a Patriots' Day celebration, and that an unattended podium was allowed to remain overnight around Memorial Day.

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[1] In point of fact, a Town resident was granted a permit to hold a "live" nativity scene and service on the Green on December 23, 2000.

In due course, the district court granted summary judgment for the defendants (the Town and various Town hierarchs). We expedited the Knights' ensuing appeal in an effort to resolve the matter in advance of the Christmas season.

II. STANDARD OF REVIEW

We review a grant of summary judgment de novo, examining the record in the light most favorable to the nonmovant and indulging all reasonable inferences in that party's favor. Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 53 (1st Cir. 2000). We will uphold the grant of summary judgment only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Here, the relevant facts are largely undisputed, so our analysis focuses on the legal question of whether either the new regulation or its application offend the First Amendment.

III. THE FREE SPEECH CLAIM

The Free Speech Clause of the United States Constitution lies at the heart of the Knights' appeal. We organize our discussion of this claim in segments.

A. The Legal Framework.

The Free Speech Clause provides, in terms, that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. Amend. I. Under the aegis of the Fourteenth Amendment, this prohibition applies equally to states and their political subdivisions. See Cantwell v. Conn., 310 U.S. 296, 303 (1940). Despite the uncompromising language in which this proscription is couched, it is not absolute.

The Supreme Court has articulated a framework for determining whether a particular regulation impermissibly infringes upon free speech rights. That framework dictates the level of judicial scrutiny that is due — and that choice, in turn, informs the nature of the restrictions on free speech that may be

permissible in a public forum. McGuire v. Reilly, 260 F.3d 36, 42 (1st Cir. 2001).

The triage works this way. The bedrock rule is that government may not prohibit all communicative activity in a public forum. Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 46 (1983). Content-based prohibitions may endure — but only if they are justified by compelling state interests. Capitol Sq. Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995). Accordingly, such prohibitions engender strict judicial scrutiny. See id. Content-neutral restrictions pose less of a threat to freedom of expression. Consequently, content-neutral restrictions on the time, place, and manner of speech trigger an intermediate type of scrutiny such that they will be upheld as long as they are "narrowly tailored to serve a significant governmental interest, and allow for reasonable alternative channels of communication." Globe Newspaper Co. v. Beacon Hill Arch'l Comm'n, 100 F.3d 175, 186 (1st Cir. 1996).

Here, the Town's limitation of free speech on the Green is not absolute: the new regulation merely prohibits one manner of expression (unattended structures) in a particular place (the Green) at certain times (when unconnected with an event). Since the Town does not deny that the Knights have a free speech interest in exhibiting the crèche or that the Green is a public forum, the salient question is whether the restriction is content-based or content-neutral. It is to that question that we now turn.

B. Content-Based or Content-Neutral?

To ascertain whether a regulation is content-based, an inquiring court must determine whether it regulates speech because of disagreement with the particular message that the speech conveys. Id. at 183. The Knights concede, as they must, that the language of the regulation is facially neutral. The ban on unattended structures is comprehensive; it does

not discriminate among types of unattended structures, and certainly does not single out the crèche. Thus, the Knights' argument boils down to a plaint that the legislative history demonstrates that the regulation's primary purpose is to prevent display of the crèche.[2]

In making this argument, the Knights rely heavily on a "free exercise" case, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). There, the Supreme Court ruled that a municipal ordinance prohibiting cruelty to animals was unconstitutional because it was targeted at preventing the sacrificial rites practiced by adherents of the Santeria religion. Id. at 547. But Hialeah is readily distinguishable because the ordinance at issue there was riddled with exceptions that effectively made it applicable only to Santeria worshipers. See id. at 535. Thus, the ordinance — unlike the regulation at issue here — was not content-neutral in its operation. See id. For present purposes, the most that Hialeah teaches is that a court may have to look beyond the bare language of a regulation to determine whether its justification is content-neutral. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[G]overnment regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech."); D.H.L. Assocs. v. O'Gorman, 199 F.3d 50, 57 (1st Cir. 1999) (same).

In the instant case, there is nothing in the record that evinces a content-based animus against the crèche. On the contrary, the Board proposed the new

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[2] The Town, citing United States v. O'Brien, 391 U.S. 367, 383-84 (1968), argues that we should not inquire into legislative purpose when a statute is content-neutral on its face. Here, however, both the text of the statute and the legislative history point toward neutrality, so we need not and do not decide whether such an inquiry is constitutionally required.

regulation only after requests for permits for alternative religious displays began to sprout. Mindful of the strictures of the Establishment Clause, the Board reasonably assumed that it must treat all applications for religious displays alike, regardless of the message conveyed. Fearing a flood of applications and a corresponding cluttering of the Green, the Board devised a regulation prohibiting all unattended structures. This is a far cry from an invidious singling-out of the crèche.[3]

The only inference that the record permits is that the new regulation was conceived out of a desire to treat all religious expression even-handedly. If the Knights feel that the burden of the regulation falls most heavily on them, it is perhaps because they are now held to the same standard as all other similarly situated applicants. While the adjustment may not be an easy one, the outcome is inescapably content-neutral.

C. Significant Governmental Interest/ Narrow Tailoring.

Having determined that the regulation is content-neutral, we now apply intermediate scrutiny to ascertain whether it is narrowly tailored to achieve a significant governmental interest. McGuire, 260 F.3d at 43.

The Town asserts that its interest in preserving the historical and aesthetic qualities of the Green amply justifies the restriction. This is a theoretically sound position. After all, in Globe Newspaper, we upheld, against a free speech challenge, a ban on news racks in a historic Boston neighborhood. 100 F.3d at 195.

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[3] The Town's longstanding practice of permitting the crèche to be displayed on the Green without a permit helps, rather than hinders, the Town's argument. That practice shows a receptivity to the display and, contrary to the Knights' importunings, creates no entitlement to preferential treatment in the future.

We recognized there that aesthetic preservation may warrant a content-neutral restriction on speech in a public forum. Id. at 187. As was true in Globe Newspaper, the Town's interest in aesthetic preservation qualifies as a significant one. Moreover, that interest is enhanced here by the site's designation as a national historic landmark.

In an attempt to blunt the force of this conclusion, the Knights argue that the regulation is not narrowly tailored to the achievement of this aesthetic rationale. They make three points: first, that it is not only unattended structures that produce clutter; second, that the Town should have pursued alternatives less restrictive than a total ban; and third, that the crèche is aesthetically pleasing. The first two parts of this argument are plainly misguided. The narrow tailoring requirement "does not mandate a least restrictive means analysis." Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 744 (1st Cir. 1995). Thus, the Town was "[not] required to implement or experiment with other alternatives before finally choosing the total ban." Globe Newspaper, 100 F.3d at 189 n.15. The "narrow tailoring" requirement is satisfied as long as the particular "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Nat'l Amusements, 43 F.3d at 744.

Here, moreover, the regulation appears entirely logical when one recalls that it was adopted amid a concatenation of Establishment Clause concerns. See Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093, 2103 (2001) (stating that avoiding an Establishment Clause violation may be a compelling state interest justifying even content-based restrictions on speech). The Town legitimately could conclude that unattended displays were more likely to present Establishment Clause issues than attended

ones because, for instance, a reasonable observer might be confused as to the source of the message.[4] Cf. Capitol Sq., 515 U.S. at 778-79 (O'Connor, J., concurring). This is significant because the context of a religious display is crucial in determining its constitutionality. Compare County of Allegheny v. ACLU, 492 U.S. 573, 621 (1989) (forbidding display of a crèche in a county courthouse), with Lynch v. Donnelly, 465.-16- U.S. 668, 685 (1984) (permitting inclusion of a crèche in a municipality's outdoor holiday display).

We note, too, that the Supreme Court has explicitly indicated that a total ban on unattended structures in a public forum would pass constitutional muster. In Capitol Square, a majority of the Justices (the plurality, plus Justices Souter and Stevens) specifically agreed that "[the state] could ban all unattended private displays" in a public forum. Id. at 783 (Souter, J., concurring); accord id. at 761 (plurality opinion); id. at 803 (Stevens, J., dissenting). Various decisions of the courts of appeals are to like effect. E.g., Am. Jewish Cong. v. City of Beverly Hills, 90 F.3d 379, 384 (9th Cir. 1996) ("The city constitutionally could ban all unattended private displays in its parks."); Congregation Lubavitch v. City of Cincinnati, 923 F.2d 458, 460 (6th Cir. 1991) (similar); Lubavitch Chabad House, Inc. v. City of Chicago, 917 F.2d 341, 347 (7th Cir. 1990) (similar). Finding no reason why the case before us demands a different outcome, we hold that the total ban on unattended structures is both content-neutral and

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[4] Although the plurality opinion in Capitol Square proposed a per se rule to the effect that the government may not violate the Establishment Clause by providing a forum for private religious expression, see Capitol Sq., 515 U.S. at 770, a majority of the Justices rejected this limited abandonment of the endorsement analysis. See id. at 787 (Souter, J., with whom O'Connor and Breyer, JJ., joined, concurring); id. at 799 (Stevens, J., dissenting); id. at 817-18 (Ginsburg, J., dissenting).

narrowly tailored to achieve a substantial governmental interest. It is, therefore, constitutionally permissible.

As to the Knights' claim that the crèche is aesthetically pleasing, the Establishment Clause makes clear. that the Town was bound to consider a range of potential religious displays when it envisioned the future of the Green. Thus, the aesthetics of the crèche, in the abstract, are irrelevant. The Town rationally could have decided that some of the requested displays, or the sheer number of potential displays, would be inconsistent with the aesthetic quality of the Green. Even if the crèche were more beautiful than all the others — a matter on which we take no view — the Town was not at liberty to allow the crèche while at the same time prohibiting other religious displays.

D. Alternative Avenues of Communication.

As a final matter, the regulation does not unduly restrict the Knights' free speech rights because they have adequate alternative avenues of communication available to them. See McGuire, 260 F.3d at 43; Globe Newspaper, 100 F.3d at 186. The Knights remain free to display the crèche, either during the course of an event on the Green or at any time on nearby private property.[5] To be sure, the Knights argue that these are not adequate alternatives — an event would be too transitory and placing the crèche on private property would not convey the same message. But the message that they suggest is suppressed is that the crèche belongs "at the center of public life in the Town of Lexington." This resupinate reasoning turns the constitutional standard upside-down. Although the Constitution protects private expressions of beliefs, it

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[5] The record shows that one of the two churches facing the Green is willing to have the crèche displayed on its front lawn for the customary six-week interval.

does not authorize — and sometimes even forbids — citizens' attempts to invoke public backing of their beliefs. The Knights have no constitutional right to communicate a message of public support for the crèche.

It is also notable that the crèche is not completely banned from the Green. Like any other ceremonial display, it may appear on the Green in conjunction with an active event for up to eight hours. The Knights have not explained why such a display is impractical, instead stating that the Town has no right to dictate to them how they must express their private beliefs. Yet the Town has issued no general ukase regarding private religious observances; only religious displays on a single strip of public land are affected. In a forum of this kind, it has long been established that government may impose reasonable restrictions on the manner of speech. See, e.g., Capitol Sq., 515 U.S. at 761. In adopting the regulation, the Town has done no more than exercise its right to manage its property in the manner it deems desirable without crossing the constitutional line.

E. Consistency in Application.

The Knights' next argument is that the amended regulation has been applied so inconsistently that it gives municipal officials unfettered discretion (and, thus, violates the rule announced in Cox v. Louisiana, 379 U.S. 536 (1965)). In Cox, the Court struck down a municipal ordinance prohibiting street parades and meetings on the ground that the ordinance effectively gave local officials unbridled discretion to permit some demonstrations and disallow others. Id. at 557. The case stands for the proposition that a neutral ordinance may violate the First Amendment if it invites uneven application.

To demonstrate that the regulation here at issue has been enforced selectively, the Knights presented

evidence of other unattended structures that have been seen on the Green since the new regulation was adopted, e.g., bleachers and a platform truck were left on the Green prior to a Patriots' Day celebration, and a podium appeared on the Green some days prior to a Memorial Day event.

The most obvious flaw in this construct is the lack of any evidence that these structures were erected by private parties. This gap is critical because the regulation was never intended to apply to actions by the Town itself. In fact, the text of the regulation, as adopted by the Board, prohibits. "[p]lacement on the Battle Green of any unattended structure by any private party" (emphasis supplied). Even though these last four words later were omitted from the printed regulation through an apparent clerical error, it is reasonable to interpret the regulation as applying only to private parties. In fact, the entire subsection in which the regulation resides (quoted in the Appendix) is most plausibly read as applying only to private conduct. For example, we do not believe that the provision prohibiting "removal[] or disturbance of any . . . monument, statue, marker, animal or plant" reasonably could be construed to prevent regular maintenance, repair, replacement, or landscaping done by the Town. Similarly, the prohibition on the use of firearms is most sensibly understood as not encompassing police officers acting in their official capacity. Because the Town is exempt from the ban on unattended structures on the Green, the Knights' claim of selective enforcement fails for evidentiary insufficiency.

IV. THE FREE EXERCISE CLAIM

The Free Exercise Clause also is made applicable to the states (and, therefore, to municipalities) through the Fourteenth Amendment. See Cantwell, 310 U.S. at 303. It provides that "Congress shall make no law . . . prohibiting the free exercise [of religion] . .

. ." U.S. Const. Amend. I. In. interpreting this language, the Supreme Court has recognized that the exercise of religion sometimes may involve "performance (or abstention from) physical acts," and that the government may violate the right to free exercise if it seeks "to ban such acts or abstentions only when they are engaged in for religious reasons." Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990). Even so, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Hialeah, 508 U.S. at 531.

The Knights' current reliance on this doctrine is misplaced. As we already have determined, see supra Part III(B), the ban on unattended structures is content-neutral in every way. For the reasons elaborated in our previous discussion, we are bound to conclude that the regulation does not discriminate against a particular religion or religious practice. See Hennessy v. City of Melrose, 194 F.3d 237, 244 n.1 (1st Cir. 1999) (explaining that private beliefs do not excuse a party from complying with a law of general applicability). Hence, the Knights cannot rewardingly invoke the Free Exercise Clause in their attack on the regulation.

V. CONCLUSION.

We do not live in a utopian world, and the myriad guarantees that the Constitution provides sometimes can operate in tension with one another. So it is here: the Establishment Clause pulls in the direction of separating church and state, while the Free Exercise Clause pushes in the direction of permitting the unfettered expression of religious doctrine. In our view, the Town has reconciled these competing centrifugal and centripetal forces in a constitutionally acceptable manner, holding the delicate balance steady and true. Admittedly, its solution — the

banning of all unattended structures from the village green — inhibits some speech, but the solution is content-neutral, narrowly tailored to suppress no more speech than necessary, and leaves open ample alternative avenues of communication. No more is exigible to withstand the intermediate level of scrutiny that the First Amendment imposes here.

We need go no further. We hold that the Town's ban on unattended structures on the Green is a permissible "time, place, and manner" restriction that operates without reference to the content of speech, and that the aesthetic preservation of so historic a landmark furnishes an appropriate basis for imposing this narrowly tailored restriction in a public forum. Because the challenged regulation leaves open many other means. of communication for religious speech and there is no competent evidence of selective enforcement, we reject the Knights' free speech claim. On much the same analysis, we likewise reject the Knights' free exercise claim. Consequently, we hold that the lower court did not err in granting summary judgment for the defendants.

Affirmed.

Appendix

RULES AND SPECIFICATIONS REGULATING
THE USE OF THE BATTLE GREEN

The following rules and regulations have been adopted in accordance with the General By-Law, Article XXV, Section 225, "Protection of the Battle Green", as amended. If these regulations or portions thereof, conflict with the By-Law, the By-Law shall take precedence.

1. DEFINITIONS

a. "Audio device" means any radio, television set, musical instrument, or other device that produces noise.

b. "Disorderly conduct" means any action intended to cause inconvenience, annoyance, or alarm, or which recklessly creates a risk thereof; fighting, threatening or violent behavior; unreasonable noise; abusive language directed toward any person present; wrestling in vicinity of others; throwing of breakable objects; throwing of stones; or spitting.

c. "Powerless flight" means any device used to carry persons or objects through the air; for example, sailplanes, gliders, balloons, body kites, hand gliders.

d. "Public use limit" means the maximum number of people or the amount, size, or type of equipment permitted on the Battle Green at one time, as established by the Board of Selectmen.

e. "Special event" means demonstrating, picketing, speechmaking, marching, holding of vigils, and all other similar forms of conduct which involve the active communication or expression of opinions or grievances, engaged in by one or more persons, the conduct of which has the effect, intent or propensity to draw a crowd or onlookers.

f. "Wet turf" shall mean any natural condition that would make the Green vulnerable to excessive damage by heavy wear or use; for example, heavy rains, reseeding, drought conditions.

g. "Non-permit activities" shall mean activities that may be engaged in without a permit issued by the Board of Selectmen.

2. NON-PERMIT ACTIVITIES

Subject to the restrictions in these rules and regulations, permits shall not be required for:

a. Conduct that does not cause public inconvenience, annoyance, or alarm.

b. Picnicking restricted to benches only and to groups of no more than five people. Picnicking on the Green by bus tours or similar groups is forbidden.

c. The gathering of groups on the Battle Green for the sole purpose of exploring and enjoying its history, and which do not remain for more than four hours.

d. Playing of audio devices at a reasonable volume.

e. The playing of games that do not:

   i. exceed three players; or

   ii. damage the Green's physical condition; or

   iii. disturb or inconvenience those visiting the Green for historic interest; or

   iv. constitute any type of disorderly conduct.

3. PERMIT REQUIRED ACTIVITIES

a. The purpose for requiring permits for certain activities is to promote the use of the Battle Green in a manner consistent with its nature and history; to protect the Battle Green from harm; to ensure adequate notice of the event so that arrangements can be made to protect the public health and safety and to minimize interference with the event by the public.

b. Permits are required for any of the following activities, singly or in combination:

   i. Any group activity reasonably likely to exceed the public use limit established by the Board of Selectmen.

   ii. Special events, public meetings, assemblies, gatherings, demonstrations, parades, and

other active public expressions of interest, not to exceed eight hours in duration.

iii. Pageants, reenactments, regattas, entertainments, or other as public spectator attractions.

iv. Displays of a ceremonial nature in connection with special events and limited in duration to the period required for such events.

v. Use of public address system, electrical lighting, or other electrical devices.

vi. Distribution of printed matter other than commercial advertising.

vii. Possession of firearms if unloaded or packed in such a way as to prevent their use.

viii. Possession of explosives, as long as individuals or groups conform to Federal, State, and local laws governing such possession.

ix. Use or possession of fireworks or firecrackers.

4. IMPERMISSIBLE ACTIVITIES

The following activities are strictly prohibited:

a. Any group activity that exceeds the public use limit established by the Board of Selectmen for the Battle Green.

b. Possession, destruction, injury, defacement, removal, or disturbance of any building, sign, equipment, monument, statue, marker, animal or plant.

c. Distribution or display of commercial advertising, or soliciting of business; or any other commercial transactions.

d. Remaining on the Battle Green for more than four hours.

e. Abandonment of any vehicle or personal property.

f. Unreasonably loud operation of audio devices.

g. Delivery of any person or thing by parachute or helicopter.

h. Powerless flight activities.

i. Begging.

j. Disorderly conduct.

k. Use of firearms.

l. Use of metal detecting device for personal use.

m. Gambling of any form or operation of gambling devices.

n. Picnicking except as provided in 2b.

o. Use of roller skates and skateboards.

p. Placement of the Battle Green of any unattended structure.

5. PERMIT PROCESS

a. Application for permits to conduct activities on the Battle Green, specified in 3, above, shall be filed no later than two weeks prior to the requested date. Late and/or incomplete applications will be considered at the discretion of the Board of Selectmen.

b. Permit applications shall include the following information:

   i. Name and phone number of a responsible contact.

   ii. Date and time of event.

   iii. Nature of event.

   iv. Expected number of participants, spectators, and vehicles.

   v. Duration of event.

vi. Statement of equipment and facilities to be used.

vii. Section of the Green desired.

c. The responsible party is to keep the permit, which must be available for inspection upon request. The responsible party may be required by the Board of Selectmen, as a condition of issuing the permit, to pay for detail police officers if the Board determines that such officers are necessary for public safety.

d. Permits are issued upon express condition the Green is to be left in an orderly fashion.

e. Permits are non-transferable; and are only valid for date and time specified.

f. A permit shall be revoked if a sanctioned event engages in impermissible activities and may be revoked if the permit group engaged in activities that are not within the specification of the permit.

g. The Board of Selectmen may alter a request by setting reasonable conditions and restrictions as to duration and area occupied, as are necessary for protection of the area and public use thereof.

h. Wet turf conditions may supersede the use of a granted permit at the discretion of the Board of Selectmen to protect the condition of the Battle Green.

6. GROUNDS FOR DENIAL OF PERMIT REQUEST

a. Prior applications for permit for conflicting schedule has been made or will be granted.

b. Event presents a clear and present danger to public health or safety.

c. Event is of such nature or duration that it cannot reasonably be accommodated in the area applied for; or the expected number of participants exceeds the public use limit.

d. Event will, in the opinion of the Board of Selectmen, cause unacceptable interference with use of the Green by the general public.

e. Event is requested for a date that conflicts with official celebrations of the Town.

f. Event is more appropriately held at other available Town facilities, such as recreational facilities.

Approved by the Board of Selectmen July 15, 1986
Amended July 24, 2000

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-2460

KNIGHTS OF COLUMBUS, COUNCIL #94, ET AL.,
Plaintiffs, Appellants,

v.

TOWN OF LEXINGTON ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: November 29, 2001

This cause came to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court
Janice O'Neil, acting clerk

BY: /s/_____
Appeals Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KNIGHTS OF COLUMBUS, COUNCIL #94, LEXINGTON, MASSACHUSETTS and MICHAEL J. O'SULLIVAN, INDIVIDUALLY AND AS GRAND KNIGHT OF THE KNIGHTS OF COLUMBUS, COUNCIL #94, LEXINGTON, MASSACHUSETTS, Plaintiffs,	
v.	Case No. 00 cv 12360 NG
TOWN OF LEXINGTON, and JEANNE K. KRIEGER, CHAIRMAN, and CATHERINE M. D. ABBOTT, ELIZABETH B. EDDISON, PETER D. ENRICH, AND DAWN E. MCKENNA, THE BOARD OF SELECTMEN OF LEXINGTON, MASSACHUSETTS Defendants.	

GERTNER, D.J.:

ORDER OF DISMISSAL

Before me is Magistrate Judge Dein's Report & Recommendation On Cross-Motions For Summary Judgment, dated August 7, 2001 ("Report"). I agree with Judge Dein's recommendation that the plaintiff's motion for summary judgment (Docket **#43)** be **DENIED** and that the defendants' motion for summary judgment (Docket #40) be **ALLOWED.** I hereby adopt the findings and conclusions of Judge Dein detailed on page 1 through page 36, line 1 of Judge Dein's Report. While I also agree with Judge Dein's conclusion that the defendants have not

violated plaintiffs' First Amendment Free Exercise rights (as described on the remainder of page 36 of the Report), I do so based on slightly different reasoning than Judge Dein's, which I will detail below.

I. FREE EXERCISE CLAUSE

In her Report, Judge Dein recommends a finding that the questioned regulation did not implicate the plaintiffs' Free Exercise rights because the regulation did not place a substantial burden on the observation of a central belief or practice of the plaintiffs. However, as the plaintiffs pointed out in their Objections to Judge Dein's Report, the Supreme Court has discouraged courts from inquiring into whether an asserted belief or practice is central to an individual's religious faith in performing its Free Exercise analysis. See Employment Div. Dept. Human Resources of Oregon v. Smith, 494 U.S. 872, 886-887 (1990), citing Hernandez v. Commissioner, 490 U.S. 680, 699 (1989); Thomas v. Review Bd. Of Indiana Employment Security Div., 450 U.S. 707, 716 (1981).

Nevertheless, even assuming for the purposes of this analysis that the plaintiffs' placing of the unattended creche on the Green is a central practice of the plaintiffs' religious beliefs, the plaintiffs' Free Exercise claim still fails. Under Smith, a neutral law of general applicability prohibiting conduct does not violate the Free Exercise Clause even if the regulation burdens an individual's religious practice so long as the law is not specifically directed at prohibiting that religious practice. Employment Div. Dept. Human Resources of Oregon v. Smith, 494 U.S. at 879-880. See also Hennesev v. City of Melrose, 194 F.3d 237, 244 n.1 (1st Cir. 1999). Here, as Judge Dein describes on pages 22-28 of her Report, no animus against Christians or the message of the creche motivated the passage of the questioned regulation. Furthermore, the statute is generally applicable as it applies to all

unattended structures on the Green that are not associated with a live demonstration or activity. Furthermore, the town has a legitimate aesthetic interest in regulating the use of the Green. Thus, regardless of the centrality of the religious practice, the regulation does not violate the Free Exercise rights of the plaintiffs because it is a neutral law of general applicability under Smith.

Thus, for the reasons detailed in page 1 through page 36, line 1 of Judge Dein's Report as well as the reasons detailed above, I **DENY** the plaintiffs' motion for summary judgment (Docket #43) and GRANT defendants motion for summary judgment (Docket **#40**). The case is hereby **DISMISSED.**

SO ORDERED.

Dated: October/z[sic]**, 2001**

/s/

Nancy Gertner, U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KNIGHTS OF COLUMBUS, et al.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	NO. 00-12360-NG
	)	
TOWN OF LEXINGTON, et al.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

August 7, 2001

DEIN, U.S.M.J.

This matter is before the court on the parties' cross-motions for summary judgment. At issue is the constitutionality of regulations enacted by the defendants, the Town of Lexington and its Board of Selectmen (collectively, the "Board" or "Selectmen"), which prohibit the placement of unattended structures on the Battle Green at the Lexington Common (the "Green"). The plaintiffs, the Knights of Columbus and its Grand Knight (collectively, "Knights of Columbus"), contend that the regulations violate their rights of free speech and free exercise of religion as protected by the First Amendment of the Constitution of the United States since the consequence of the regulations is to prohibit them from displaying a crèche (Nativity Scene) on the Green to celebrate Christmas. The Board, on the other hand, argues that the regulations are content-neutral and are reasonable and enforceable restrictions on time, place and manner of speech.

For the reasons detailed herein, this court recommends to the district judge to whom this case is assigned that the plaintiffs' motion for summary judgment (Docket #43) be DENIED; and that the defendants motion for summary judgment (Docket #40) be ALLOWED.

PROCEDURAL BACKGROUND

On November 6, 2000, the Board amended existing regulations and enacted new regulations, including one which prohibits the "[p]lacement on the Battle Green of any unattended structure." As a result, the plaintiffs' request for a permit to display a crèche was denied, On November 21,2000, plaintiffs moved for a preliminary injunction seeking an order that they be allowed to display the crèche during the period December 3, 2000 to January 6, 2001. After briefing and argument, on December 6, 2000, the District Court (Gertner, J.) denied the motion and issued a memorandum in which the court concluded "that plaintiffs are unlikely to succeed on the merits of their Complaint." Knights of Columbus v. Town of Lexington, 124 F. Supp. 2d 119, 122 (D. Mass. 2000).

Plaintiffs filed an emergency motion for a preliminary injunction pending appeal. This motion was denied by the First Circuit Court of Appeals "essentially for the reasons set out by the district court at greater length in its December 6, 2000 memorandum." (First Circuit Court of Appeals No, 00-2539, Order entered December 20, 2000). The Court further ruled that "the preferred posture in which to address the constitutional issues will be in an appeal from the grant or denial of permanent injunctive relief." Id.

The plaintiffs then served interrogatories and a document request, and sought to depose the five named defendant members of the Board of Selectmen. The Board responded with a motion for a protective order seeking an order precluding any discovery on

the grounds that all relevant information had been produced in connection with the motion for a preliminary injunction (Docket #26). On March 27, 2001, this court issued a Memorandum of Decision and Order allowing the motion in part and denying the motion in part. Knights of Columbus v. Town of Lexington, 138 F. Supp. 2d 136 (D. Mass. 2001).

The issue raised by the motion for a protective order was what information could properly be considered in determining the motives of the Board in enacting the regulations. This court ruled that the motives and thoughts of individual legislators are not controlling on the issue of constitutionality of legislation. See United States v. O'Brien, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 1682-83, 20 L.Ed. 2d 672 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter" and court will not rely on statements made by individual legislators since "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . ."). Moreover, the doctrine of legislative immunity safeguards legislators from having to testify regarding their motives. See Miles-Un-Ltd., Inc. v. Town of New Shoreham, 917 F. Supp. 91,99 (D.N.H. 1996), and authorities cited; Acevedo-Garcia v. Vera-Monroig, 204 F.3d I, 8 (lst Cir. 2000). As a result, courts rely on "objective indicators of intent," including the "face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment, the stated purpose, and the record of proceedings." City of Las Vegas v. Foley, 747 F.2d 1294, 1297 (9th Cir. 1984), as quoted in Colacurcio v. City of Kent, 163 F.3d 545, 552 (9th Cir. 1998), cert. denied, 529 U.S. 1053, 120 S.Ct. 1553, 146 L.Ed. 2d 459 (2000). Put another way, "[r]elevant evidence, includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or

administrative history, including contemporaneous statements made by members of the decisionmaking body." Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540, 113 S.Ct. 22 17, 2230-3I, I24 L.Ed.2d. 472 (1993) (citations omitted). However, such statements we relevant only "if they show objective manifestations of an illicit purpose, such as a departure of from normal procedures or a sudden change in policy" Colacurcio, 143 F.3d at 552.

Based on this standard, this court limited the discovery to which the Board had to respond and precluded the deposition of the individual Selectmen The plaintiffs were invited to seek additional discovery based on a specific showing of need, but they never did so. The plaintiffs did move for reconsideration of this court's ruling, which motion was denied. (Docket #36, 39).

The parties filed cross-motions for summary judgment on May 22, 2001 and filings were completed on June 20, 2001. Oral argument was heard on July 2, 2001. Although plaintiffs have not filed any motion to strike, they do object to this court's consideration of "statements of opinion by the defendants" and "claims as to the motivations of the members of the Board of Selectmen contained in the defendants' statement." Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment ("Plaintiffs' Opp.") (Docket #49) at pp. 2, 3. As evidenced by the following statement of undisputed facts, this court remains guided by the above-stated principles in determining the relevant issues of motive and intent.[1]

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[1] Despite the plaintiffs' objections to the inclusion of some material in the record, all parties agree that the material facts are not in dispute.

UNDISPUTED MATERIAL FACTS

The first battle of the Revolutionary War occurred on April 19, 1775 at what is now known as the Lexington Battle Green. Affidavit of Peter Enrich ("Enrich Aff.") (included in Docket #42) at ¶4. Seven of the eight minutemen killed during the battle are buried on the Green and the famous Minuteman Statue is located at the apex of the Green. Id. The Minuteman Statue commemorates the efforts of the American colonists who fought in the Revolutionary War. Id.[2] The Battle Green is a registered National Historic Landmark and is also listed in the Massachusetts State Register of Historic Places. Id. at ¶5.

Regulation of the Battle Green

Pursuant to the General By-Laws of the Town of Lexington, the Board of Selectmen is entrusted with the protection of the Battle Green, and the Board is authorized to promulgate regulations governing the use of the Green. Id. at ¶6 and Ex. A. The most recent "Rules and Specifications Regulating the Use of the Battle Green" were adopted by the Board on July 15, 1986 (id. at Ex. C) and amended on July 24, 2000 (id. at Ex. B). They are divided into three categories: activities which can take place without a permit ("non-permit activities"), activities for which permits are required ("permit required activities"), and activities which are strictly prohibited ("impermissible activities"). Id. at Exs. B & C at ¶¶2, 3, 4. The 2000 Regulations also added rules regarding the "permit

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[2] The plaintiffs refer to the use of the Green prior to the Revolutionary War and describe it as a "center of spiritual activity." Although this court has no reason to disbelieve these descriptions, they are not supported by the record. See Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Mem.") (Docket #44) at p. 3, ¶9. In any event, these facts are not material, and the parties agree that the Green has special historic significance.

process" and "grounds for denial of a permit." Id. at Ex. B at ¶¶5, 6. The rationale for requiring permits has remained unchanged. Thus, the 1986 and 2000 Regulations provide:

> The purpose for requiring permits for certain activities is to promote the use of the Battle Green in a manner consistent with its nature and history; to protect the Battle Green from harm; to ensure adequate notice of the event so that arrangements can be made to protect the public health and safety and to minimize interference with the event by the public.

Id. at Exs. B and C at ¶3a.

The following chart details (and is marked to show) the relevant changes to the Regulations regarding activities which require a permit:

1986 Regulations (Ex. C)	**2000 Regulations (Ex. B)**
1. Any group activity reasonably likely to exceed the public use limit established by the Board of Selectmen.	i. No change.
2. Special event,[3] public meetings, assemblies, gatherings, demonstrations, parades and other public expression of opinion.	ii. Special events, public meetings, assemblies, gatherings, demonstrations, parades and other active public expressions of interest, not to exceed eight hours in duration.

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[3] "Special event" is expressly defined in both sets of Regulations as "demonstrating, picketing, speechmaking, marching, holding of vigils, and all other similar forms of conduct which involve communication or expression of opinions or grievances, engaged in by one or more persons, the conduct of which has the effect, intent, or propensity to draw a crowd of onlookers." Id. at Exs. B and C, at ¶1e.

3. Pageants, reenactments, regattas, entertainments, or other as public spectator attractions.	iii. No change.
4. Displays of a religious or ceremonial nature.	iv. Displays of a [ ] ceremonial nature in connection with special events and limited in duration to the period required for such events.

In the 1986 Regulations, the list of impermissible activities made no mention of unattended structures. It did, however, recognize temporal limitations on the use of the Green. Thus, among the activities that were strictly prohibited were:

> d. Remaining on the Battle Green for more than four hours.
>
> e. Abandonment of any vehicle or personal property.

Id. at Ex, C at ¶4. These prohibitions remained in the 2000 Regulations. Id. at Ex. B at ¶4. In addition, the following prohibition was added:

> p. Placement on the Battle Green of any unattended structure.

Id.

Traditional Uses of the Green

The Green has traditionally been used as a gathering place for the expression of all views: political, religious, personal, public or otherwise. Thus, in response to plaintiffs' requests for admissions, the Board has admitted that:

> The Battle Green has been the site of prayer vigils, press conferences, Halloween parades, labor rallies, a diversity festival, Easter

> Services, Peace vigils, protests over the impeachment of President Clinton, re-enlistment ceremonies, interfaith services, protests over the exclusion of the crèche, and of the annual reenactment of the Batik of Lexington and Concord.

Defendants' Response to Request No, 17 (Plaintiffs' Ex. Q).[4] "In a typical year, events on the Green include religious services, fairs, re-enactments, celebrations, and rallies." Knights of Columbus, 124 F.Supp.2d at 121. These uses have continued following the adoption of the 2000 Regulations. For example, "[i]n the recent past, the Green has been used for Easter Sunrise Services, weddings, a prayer rally for the National Day of Prayer, a demonstration against commercial flights at Hanscom Air Force Base, a rally in support of the labor strike at Raytheon Corporation, and for a variety of other events." Enrich Aff. at ¶9. In April 2001, the annual Patriots Day celebration, including the reenactment of the Battle of Lexington, was held on the Green, as were rehearsals for the event. See Third affidavit of Peter D. Enrich ("Third Enrich Aff.") (Docket #47) at ¶¶1-2, Ex. A. The annual Memorial Day ceremony was held on the Battle Green on May 28, 2001. Second Affidavit of Jeanne Kreiger ("Second Kreiger Aff.") (Docket #52) at ¶¶1, 2. "It began with a prayer led by a chaplain from Hanscorn Air Force Base, and also included a volley by the Lexington Minutemen, a speech by Col. McCarraher, a reading of the Governor's Proclamation, a flag raising, a wreath laying, a performance by a local band, and a closing prayer by the chaplain."[5] Id. at ¶2. It is undisputed that, apart from the crèche, the Green has not regularly been the

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[4] "Plaintiffs' Ex." refers to the exhibits attached to Plaintiffs Mem. (Docket #44).

[5] More details about the podium and seating used in this and other events will be discussed infra.

site of unattended structures expressing information, opinions or beliefs. See Enrich Aff. at ¶ 12; Plaintiffs' Mem. at 1-2 (the only other unattended structures to which plaintiffs refer are non-expressive items such as flatbed trucks, bleachers and podiums).

History of the Crèche on the Green

A crèche has been placed on the Green each Christmas season for much of the past eighty years, beginning in the early 1900's. Enrich Aff. at ¶ 10. For several years, the crèche was placed in a different park in Town, and there was no display mound the time of World War II. Id. After the War, the Town was effectively the owner of the crèche and was responsible for its maintenance, erection and storage. Id.

In 1973, an issue arose as to whether the Town should be responsible for continuing to display the crèche and whether it should remain on the Green. See id. at ¶11, Ex. D. At the Selectmen's Meeting of October 29, 1973, it was unanimously voted:

> to grant permission to the Knights of Columbus, Lexington Council No, 94, acting alone or in concert with the Simon W. Robinson Lodge, A.F. & A.M. to display the crèche on the Green during the annual Christmas season, with the following understanding:
>
> 1. That they assume the responsibility for the erection, care, removal and storage of the Crèche.
>
> 2. That they install a plaque indicating that the display is privately sponsored and identifying those sponsors.

Id. See also Plaintiffs' Ex. E.

Since at least 1982, the Regulations for the use of the Green would have required a permit for the

display of the crèche, Enrich Aff. at ¶12. From 1973 through the 1998 Christmas season, however, the crèche was displayed on the Green without prior approval or permit. Id at ¶¶12, 16.

The placement of the crèche on the Battle Green was a matter of much controversy in the Town. The plaintiffs cite to the statements of defendant Peter Enrich at a meeting to summarize the objections to the placement of the crèche on the Green as being to the display of a "majority religious symbol" that left some residents feeling alienated and disenfranchised. See Plaintiffs' Mem. at p. 6,¶25. While this description is not comprehensive, it does accurately reflect many of the objections to the (semi) permanent display of a religious symbol on the Green.

The minutes of the meeting of the Board of Selectmen of November 2, 1998 report that Rev. Helen Cohen of the First Parish Church and President of the Lexington Clergy Association, had been invited to attend the meeting and "to explain the efforts of the Clergy Association to address on it common ground the location of the crèche on the Battle Green." Enrich Aff. at Ex. E; Plaintiffs' Ex. F. According to Rev. Cohen, the Clergy Association had worked on the matter in 1972, and then, again, over the course of the past 3 years. There were differing opinions "even within the Clergy Association." Id. A group had been created, called "Meeting Ground," to "explore options and hopefully come up with something that will be satisfactory to all people." Id.[6] The group consisted of members of the clergy and other citizens with various viewpoints. At the request of Rev. Cohen, the Selectmen took no action on the issue of the location of the crèche and it was displayed on the Green

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[6] Although the plaintiffs state that "Meeting Ground" was organized on September 27, 1999, they rely on the same minutes as the defendants, and this seems to be a simple error. See Plaintiffs' Mem. at pp. 3-4, ¶¶ 15, 16.

during the 1998 Christmas season. Id.. See also Enrich Aff. at ¶15.

A regular meeting of the Board of Selectmen was held on September 27, 1999, Enrich Aff. at ¶17 & Ex. F; Plaintiffs' Ex. G. Rev. Cohen reported on the results of the Meeting Ground group's work. As reported, the

> Committee, after much review, came to the unanimous conclusion that private citizens do have the right to have religious observances and displays on the common land within guidelines established by the town. The Committee then focused on the duration of the display on the Green and the hope that the group could reach a decision; however, Meeting Ground is unable at this time to propose a specific time period that everyone can live with.

Id. The Committee did, however, recommend that the display be for a shorter period than in prior years, and that it reconsider the matter again beginning In February 2000. The owners of the crèche, including the Knights of Columbus, agreed to a shorter period of three weeks. Id.

There was an open forum and comments from a number of members of the audience. The minutes describe these as "discussion and questions . . . concerning the length of the display, religious expression versus display of an 'unattended structure,' whether the display is allowed or not under the Constitution and use of another location in the proximity of the Green." Id. The Board continued the matter for decision at the next meeting. Id. See also Plaintiffs' Ex. H, which includes the Meeting Ground's Proposal, which is incorporated in the Board minutes, and a newspaper article dated September 9, 1999 which reported that "[l]ast year, calls for the removal of the nativity scene from public grounds were

highlighted by a December protest rally organized by a group of Lexington High School students."

After the meeting, the Board received "quite a bit of mail and calls, more than on any other issue." Enrich Aff. at Ex. G (Board Minutes of October 18, 1999). One piece of correspondence from a Town resident suggested that unless the Town was prepared to approve every type of display imaginable,[7] "[a]lternatively the Town could simply ban all unattended displays on the Battle Green." Id. at Ex. L.[8] Thus, the record does not support the plaintiffs' contention that the possibility of competing structures on the Green did not arise until it was clear that the Selectmen intended to ban the crèche. See Plaintiffs' Mem, at 24. The possibility that the Green could be transformed into a field of signs and structures arose early on in the debate.

The crèche was next discussed by the Selectmen at their meeting of October 18, 1999. Id. at ¶18, Ex. G.[9] There were public comments and then comments from the Board. The Board members expressed their personal concerns that the issue was divisive, that regulations were not being followed, that "neither a

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[7] The writer suggested that such displays might include a "depiction of human sacrifices," "a commemoration of the Mayan or Aztec religious festivals, which were oriented around blood-letting," or "a commemoration of the religious practices of the Crusaders, which included the burning of entire communities of Jews and the sacking of Christian Constantinople." Another writer suggested a statue of the late Flip Wilson and a herd of live cattle to honor Hindus. Id. at Ex. L.

[8] According to the writer, while putting up displays of their opinions and "walk[ing] away is just too much," "[i]f anyone cares enough to stay up all night with their religious (or political) displays for four weeks, maybe we should let them have that opportunity. Id. at Ex. L.

[9] Although the plaintiffs do not mention this meeting, the facts do not seem to be in dispute.

complete ban nor a status quo" was appropriate, that the "crèche is a symbol of peace but does not belong on the Battle Green," and that the crèche "causes displeasure and alienation and gives a message that it has public endorsement."[10] Id. at Ex. G. The Board voted 4-1 to permit the placement of the crèche for a reduced 3 week period for the 1999/2000 Christmas season, While not focally voted upon, the minutes indicate that the matter was to be revisited for the next season. Id.

Community Response

In response to the vote allowing the display of the crèche, on or about November 2, 1999, the Board received a request for "a permit to erect a privately owned temporary religious structure on the Battle Green" from a group of residents calling themselves "Citizens for the Protection of the Battle Green." Id. at Ex. H. The permit was for a 4 feet by 8 feet plywood sign stating in part that the crèche is a "privately owned religious structure," that it "does not represent an 'establishment of religion' by the Tom of Lexington" and that "[i]t is placed here in spite of the objections of the Lexington citizens of many different faiths, who believe that private, sectarian, religious displays are inappropriate on public lands." Id.

The permit request was discussed at the Selectmen's meeting of November 22, 1999, at which time it was denied in the absence of a motion. According to the minutes:

> The Board discussed several points: the request is far different as it is for a sign and

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[10] While in his affidavit Mr. Enrich seeks to expand upon his grounds for opposing the crèche (¶18), in the absence of any transcript of the meetings, or statement of his thoughts in the minutes, these personal, after the fact, comments will not be considered in ruling on tie motion for summary judgment.

> not a structure, there is a clear distinction between a Crèche and signage; the sign being requested would come under the Town's Zoning By-laws; there will be further dialogue after this Christmas season encompassing a wider range of citizen input; different interpretations of the constitution; concern that the proposed sign is an effort to characterize a structure placed on the Battle Green by another group and appears to be adversarial, and the desire of the Board to have the request withdrawn.

Id. at Ex. I. Other permit requests were also discussed, but no action was taken. Id.; Enrich Aff. at ¶22. These permits were characterized as being fur "privately owned religious objects and structures on the Battle Green." Enrich Aff. at Ex. J. One was for a "witch, a skeleton, and a ghost" in honor of witchcraft, "a recognized religious practice in Massachusetts since the days of the Salem Trials." The other was the erection of a Pyramid to honor the Egyptian Sun God Ra, which was proposed for April 2000. The proponents of the permits noted that they

> do NOT believe that actually granting these permits is in the public interest. We do, however, believe that if the Board of Selectmen permit a crèche to be placed on the Battle Green, and then reject permits for these displays, it constitutes Constitutional grounds for legal action against the Board for denial of equal protection, interference with free speech, and establishment of one religion in preference to another.

Id. Additional requests for approval of structures on the Green came in from various members of the community. For example, on November 4, 1999, there was an inquiry about placing a Sukkah on the Green during the period October 10-22, 2000. Id. at Ex. K. It

was described as "an open structure that will measure approximately 8' wide by 14' long by 8' high," it celebrates the Jewish harvest festival of Sukkot, and the applicant noted that "[i]n light of the Crèche decision and the support of the Selectmen for diversity of expression on the Green, I do not suppose that there will be any issue about approval for this request." Id. It was clear that the crèche, if allowed to remain on the Green, was no longer going to be the only unattended expressive structure placed there.

The Meeting Ground group appeared at the Selectmen's meeting of July 10, 2000, but it did not have any new recommendation for the Board to consider. Id at Ex. M. In the context of discussion about how to deal with the crèche on the Battle Green, the Selectmen voted 3-2 "to request that Town Counsel review the Rules sued Regulations concerning use of the Battle Green and strengthen the regulations to prohibit the erection of unattended structures on the Green." Id. See Plaintiffs' Ex. 1, excerpts from transcript of meeting.[11]

The next Board meeting was held on July 24, 2000. Id. at Ex. N. At that time, acting Town Counsel reviewed the proposed changes to the Battle Green Regulations, including prohibiting the placement of any unattended structure on the Green by any private party. Id. After discussion by the audience in favor of and opposed to taking the crèche off the Green, the amendments to the Regulations were approved by a vote of 4-1. Id. The modification of the Regulations was described as "the culmination of a process initiated by the Board nearly two years ago to bring closure to

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[11] In their affidavits, defendant Peter Enrich and, to a lesser extent, Jeanne Kreiger detail the concerns of the Selectmen in voting for the amendments to the Regulations. To the extent that these opinions are not reflected in contemporaneous or historical expressions of intent or fact, they will not be considered in connection with ruling on the motions for summary judgment.

whether—to the issue of whether to continue to permit the placement of the crèche on the Green." Plaintiffs' Ex. J, p. 5. In connection with its vote, the Board rejected a suggestion that permit applications be considered on a case-by-case basis, or that the content of an message be examined. Enrich Aff. at Ex. O, pp. 120-22; Ex. P, pp. 123-24. Defendant Peter Enrich's contemporaneous statements are consistent with the facts as presented by all parties to this litigation with respect to the expressed motives and intent of the Board in enacting the Regulations. As he stated:

> Mr. Enrich: I think the crèche is clearly the trigger for us facing a very complex and difficult issue. The complex and difficult issue goes to the heart of one of the responsibilities of the Board of Selectmen, which is the stewardship for the Green. It's an important responsibility. It's a responsibility that we address in other respects, but this is probably the most heated and difficult context that has -- that is going to arise about it. And when you confront that question, the question that you confront is the question of: What is the appropriate range of uses of the Green for expression of private views? Those are private views about religion, private views against religion, private views of political candidates, private views around a whole range of issues. And to try to address one in isolation from the others strikes me as something that would be ill-considered.
>
> When we confront it, and at least for me, having grappled with this as hard as I know how to grapple with something and listened as hard as I know how to and I think coming to a fairly good understanding of the perspectives of a pretty wide range of people, I'm convinced of first, that there is not an

> Immediate strategy that we can pursue that isn't going to make some people very unhappy. I think that's inevitable and it's extremely unfortunate And I think we've looked long and hard. We've asked others to help us look long and hard. And I don't think there is such a strategy.
>
> What I, personally, have concluded is the best strategy is one that recognizes the right of individuals and groups to use the Green for displays of their opinions in the form of events, of worship services, of political meetings, of marches, of vigils, of any sort of activity like that. But to allow its use for groups to place a structure that stands there for an extended period of time to represent their views is problematic. It's problematic in that it sends some confusing messages about who endorses those structures. It's problematic in that it is now beginning to invite, via battles of competing structures trying to deliver competing messages, something that I think is just completely contrary to what I think of as the proper meaning of the Green.
>
> And so I think that although it's not a perfect solution, it is an equitable, responsible solution which draws the distinction and says: Activities, events, we will permit broadly, essentially, universally; structures representing the views of private groups we will forbid universally and equitably. Is that perfect? No, of course it's not perfect.

Enrich Aff. at Ex. O, pp. 120-22.

Chairman Jeanne Kreiger shared this sentiment, using language on which the Knights of Columbus rely. As she stated at the meeting:

> The display of the crèche on the Green has been a matter of public debate for more than two years. We've had discussions here in front of the Board of Selectmen. There have been a variety of formal and informal discussion groups by the clergy. There's been discussions in the Lexington Minuteman, through public assembly, on local access TV and through the TMMA e-mail list. These public discussions have, in general, been fairly divisive, and in some cases, quite destructive. Continued public debate, in my opinion, will not lead to a solution that will be satisfactory to all Lexington residents.
>
> The Board of Selectmen is acting on our personal convictions and on what we, as individuals, believe represents the perspective of the majority of the citizens of Lexington. As one caller said to me this weekend, "There are many churchgoing Christians, many long-time residents of Lexington, who recognize that times have changed and the display of the crèche on the Green is no longer appropriate."
>
> I would hope that our discussions this evening will focus on the recommended changes -- the bylaw enhancements and the appropriateness for invoking what we believe to be the majority opinion of this Board and the majority of the residents of Lexington.

Plaintiffs' Ex. J at 7-8; Plaintiffs' Mem. at p. 5, ¶20.

Events Following the New Regulations

Following the enactment of the new regulations, the Green continued to be used for active events and expressions of opinion as described above. Specifically, but without limitation, the Selectmen's minutes of September 25, 2000 reflect the approval of

the use of the Green by the Lexington Minutemen for change of command and installation of officers ceremonies, and a rehearsal as before. Enrich Aff. at Ex. Q. In addition, the Board approved 12 weeks of rallies to be held on Wednesdays from 4:00-600 P.M. protesting the exclusion of the crèche from the Green. Id., Enrich Aff. at ¶40.

On October 19, 2000, the plaintiff Michael O'Sullivan, individually and on behalf of the Knights of Columbus, requested a permit to erect a crèche on the Green. Enrich Aff. at Ex. R. He also stated that if approval was not granted by October 30, 2000, he would treat it as having been declined and commence legal action. Id.

At the meeting held on October 30, 2000, the application for a permit was not acted upon and was considered constructively denied. Plaintiffs' Mem. at p. 6, ¶28; Plaintiffs' Ex. N. At the meeting, defendant Peter Enrich stated as follows:

> Mr. Enrich: I do think that this is an important point because I know that some people have concluded that the Board's actions last summer were directed at a specific religious expression. And I have had people accuse me of being anti-Christian. And nothing could be further from the truth. The fact of the matter is that this, at least in my mind, was intended as a completely neutral attempt to address a problem of requests for appropriate uses that came from a number of directions.
>
> . . .
>
> And I, personally, am convinced that our function, as a Board of Selectmen, is to preserve the hallowed space of the Green. This is a historic battlefield which we are meant to protect and honor. And I don't think it's an appropriate place for an endless

> barrage of privately sponsored displays supporting either religious, political, commercial or other viewpoints. I mean there are ample opportunities elsewhere for such viewpoints to be displayed. And that it is our function to erasure that the Green is preserved for its proper uses.
>
> One of those proper uses has been, and I believe should continue to be, as a place for expression, for speech, for assembly. And I don't believe that since the time of the Vietnam War, which was long before I served on this Board, I don't believe we have ever withheld a permit for an assembly or a gathering or an event to express views religious, political or otherwise And I think it would be extraordinarily ill-advised for us to ever do so. But I think the decision to place structures for extended periods of time on the Green is a very different matter and that it's important that we stand by the decision we made last summer.

Enrich Aff. at Ex. S, pp. 13-16. The Board invited the applicant to submit an application consistent with the regulations, such as a one day celebration of which a crèche or a structure was a part, but no subsequent application was made. Enrich Aff. at ¶44, Ex. T, pp. 9-10.

On December 12, 2000, a resident of Lexington applied to the Board for permission to hold a "live" nativity scene and service by Reverend DiLorenzo on the Green on December 23, 2000 from 7:00 P.M. to 10:00 P.M. Supplemental Affidavit of Peter D. Enrich (Docket #42) at Ex. A. The permit was approved by the Board on December 18, 2000. Id. at Ex. B.

Application of the New Regulations

Plaintiffs complain that the new Regulations are not being uniformly enforced. Specifically, plaintiffs assert that no formal permit was required for the annual reenactment of the battle of Lexington. See Plaintiffs' Ex. O at Request No. 33. This celebration, which takes place April in connection with Patriots Day, is provided for in the Town's By-Laws, and the Town Celebrations Committee is responsible for "the planning and carrying out [of its] proper observance . . . ." Third Enrich Aff. at ¶1, Ex. A. While no special permit was issued, the Board was notified in advance of the date of the Patriot's Day Reenactment. See id. at Ex. B (minutes of 9/25/00). In addition, the Board expressly approved the request of The Lexington Minutemen to use the Battle Green for rehearsal of the reenactment at specified dates and times, to use the Battle Green for a Fife and Drum Tattoo at a specified date and time, and to close certain streets for the reenactment of the midnight ride of Paul Revere. Id. (minutes of 3/1 9/01 and related documents, minutes of 4/2/01).

Plaintiffs further challenge the placement of "structures," namely, bleachers, podium and a platform truck, which were placed, and left on the Green for longer than eight hours in connection with the Patriots Day celebration and Memorial Day ceremonies. The defendants counter that these structures were in connection with active, approved events, and that the length of time was needed to accommodate the schedules of Town personnel who installed and removed them. See id. at ¶¶4-6; Second Krieger Aff. at ¶¶2-4.

The Regulations do not expressly provide for these extended placements of support structures. "Displays of a ceremonial nature in connection with special events and limited in duration to the period required for such events" are authorized by the new

Regulations. Enrich Aff. at Ex. B, ¶3.iv. The "permit process" added in July 2000 also states that permit applications should include the "statement of equipment and facilities to be used." Id. at Ex. B, ¶5(b)(vi). However, during discussion about the proposed regulations, Mr. Enrich had stated "[j]ust to clarify: If I'm understanding correctly, these 'displays of a ceremonial nature' people should understand, under the proposed regs, could only be there for the period requisite fur the event. And an 'event' is, by definition 'no more than eight hours.' My understanding is that the intent of the language is that if the structure had to be put up the night before to be available for an event the next day: a stage for Lex Fest, or a pulpit for the midnight service or something like that, of course it could go up the night before. That's what the language is: the period required fur such events. But beyond that, it would not be permissible." Plaintiffs' Ex. J at 17 (transcript of 7/24/00 meeting).

ANALYSIS

The First Amendment to the Constitution of the United States provides as follows:

> Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. I. These rights have been applied to the States through the Fourteenth Amendment. See Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). Plaintiffs' challenge requires an analysis of two fundamental freedoms protected by the First Amendment: freedom of speech and freedom of religion. After careful analysis, this court concludes that the new

Regulations enacted by the Board do not violate the plaintiffs' constitutionally protected rights.

A. Rights of Free Speech

It is undisputed that the Battle Green is a "public forum," the type of place which has "immemorially been held in trust for the use of the public and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Comm. for Indus. Org., 307 U.S. 496, 5 15, 59 S. Ct. 954, 963, 83 L.Ed. 1423 (1939), quoted in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794 (1983). "In these quintessential public forums, the government may not prohibit all communicative activity." Perry, 460 U.S. at 45, 103 S.Ct. at 955. The standards for evaluating what limitations on communicative activity may permissibly be imposed are easy to state, but far more difficult to apply. Thus, if a limitation on expression is "content-based," it is subject to a "strict scrutiny" standard, and the state "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Id. (citation omitted). This is the standard plaintiffs argue should be applied in this case. The Board, on the other hand, argues that an "intermediate" standard of scrutiny is applicable to its content-neutral regulations. Thus, the state may "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Id. and cases cited. See also Globe Newspaper Co. v. Beacon Hill Architectural Com'n, 100 F.3d 175, 182 (1st Cir. 1996), and cases cited (applying Perry standards to analyze constitutionality of limits imposed on distributing newspapers in a public forum). "Given the 'differing analytic modalities, it is unsurprising that

many First Amendment battles over the constitutionality of government regulations start with a debate about what level of scrutiny is appropriate.' The instant case is no exception." Id. (internal citation omitted).

The Regulations Are Content Neutral

The recent case of Bartnicki v. Vopper, __U.S.__, 121 S.Ct. 1753 (2001), on which plaintiffs rely, confirms the standard for determining whether a regulation is content-based. As the Bartnicki court held:

> "Deciding whether a particular regulation is content based or content neutral is not always a simple task. . . . As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 642-643, I29 L.Ed.2d 497, I I4 S.Ct 2445 (1994). In determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation; typically, "government regulation of expressive activity is content neutral so long as it is *'justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L.Ed.2d 661, 109 S.Ct. 2746 (1989).

Id. at 1760. The "fundamental principle that underlies [the] concern about 'content-based' speech regulations [is] that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'" City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-49, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (quoting

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-94, 92 S.Ct. 2286, 2289-2290, 33 L.Ed.2d 212 (1972)).

The Regulations at issue are facially neutral, and do not distinguish between the contents of any different types of speech. All expressive unattended structures, regardless of the message conveyed, are prohibited.[12] There is no need to consider the substance of the message being conveyed. Under such circumstances, the Regulations can be "justified" without reference to the content of regulated speech and are content neutral. See, e.g., United States v. Grace, 461 U.S. 171, 181 n.10, 103 S.Ct. 1702, 1709 n.10, 75 L.Ed.2d 736 (1983) (total ban on two types of expressive conduct, picketing and leafleting, is clearly facially content-neutral); Globe Newspaper Co., 100 F.3d at 183, 186 (total ban on newsracks is content neutral); Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992), and cases cited (ban on off-premises billboards is viewpoint neutral since it is a regulation based on location and not on the viewpoint of the speaker). See also City of Cincinnati v. Discovery Network, Inc., 507 US. 410, 425 n.20, 429, 113 S.Ct. 1505, 1514 n.20, 1516, 123 L.Ed.2d 99 (1993) (while total ban on off-site billboards or newsracks may be permissible, when an examination of content is required to determine which regulations apply, regulations are "content-based"); Id. at 425 n.20, 444-45, 113 S.Ct. at 1514 n.20, 1524-25 (analyzing Metromedia Inc. v. City of San Diego, 453 U.S. 494, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), where seven Justices concluded

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[12] The First Amendment protects expressive conduct. See Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 & n.5, 104 S.Ct. 3065, 3069 & n.5, 82 L.Ed.2d 221 (1984). Thus, the fact that the Regulations may allow non-expressive structures such as bleachers dues not implicate First Amendment rights except to the extent that such allowance calls into question the Board's stated reasons for the Regulations. As discussed infra, however, this court finds that the Board's rationale is supported by the record.

that the city could completely ban off-site commercial billboards due to safety and esthetic reasons).

Plaintiffs argue that this court should look behind the language of the Regulations and rule that the Board's purpose in enacting the Regulations was to suppress "the message of the crèche presence on the Battle Green," a message which some Town residents found offensive. See Plaintiffs' Mem. at 20 ("Interest Sought To Be Achieved By The Selectmen"). "An ordinance is not content-neutral if the government has adopted it 'because of disagreement with the message it conveys.'" D.H.L. Assocs. v. O'Gorman, 199 F.3d 50, 57 (1st Cir. 1999) (internal citations and quotations omitted). Plaintiffs' argument fails in this case since the objections raised concerning the crèche were not to any "message," but to the time, place and manner of its dissemination.

As an initial matter, and perhaps controlling, is the fact that the crèche is not banned from the Green. It may be displayed in connection with special events, or other active uses of the Green. Thus, the premise of plaintiffs' argument, that the "message of the crèche" has been suppressed on the Green, is without support.

Even if, however, inquiry into the motives of the Board is warranted, the plaintiffs still cannot prevail. The record does not support plaintiffs' claim that the Regulations were enacted due to hostility toward the message of the crèche.

It is well established that any analysis as to the Board's "motives" must be tempered by the established principle, noted above, that "[i]nquiries into congressional motives or purposes are a hazardous matter." O'Brien, 391 U.S. at 383, 88 S.Ct. at 1682. A court will not void a statute that is constitutional on its face based on legislative statements; where it "could be reenacted in its exact form if the same or another legislator made a 'wiser'

speech about it." Id. at 384, 88 S.Ct. at 1683. Moreover, as Justice Scalia stated in his concurring opinion in Hialeah, a case on which plaintiffs rely extensively, "it is virtually impossible to determine the singular 'motive' of a collective legislative body . . . . The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted . . . ." Hialeah, 508 U.S. at 558, 113 S.Ct. at 2240-41.

Consistent with these principles, where, as here, "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech," the fact that enactment of the restrictions was motivated by a politically charged issue does not invalidate the restrictions, Hill v. Colorado, 530 U.S. 703, 719, 120 S.Ct. 2480, 2491, 147 L.Ed.2d 597 (2000) (restrictions on dissemination of information upheld even though enacted as a result of incidents at abortion clinics, where restrictions applicable at all healthcare facilities). The "contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support." Id. at 724, 120 S.Ct. at 2494 (internal citations omitted). See also City of Renton, 475 U.S. at 47, 106 S.Ct. at 929 (where ordinance seeks to control secondary effects of speech, fact it restricts some speech does not make it invalid).

Even the must detail-driven analysis of the legislative history in this case does not support the conclusion that the Regulations were enacted to suppress the "message of the crèche" as opposed to regulating the time, place and manner of its expression. Those voicing their opinions recognized that the use of the Green for the expression of religious beliefs, including Christianity, could and would continue unabated — it was the erection of a semi-permanent display which was left unattended

which raised the ire of some residents. The records indicate that some Christians shared the view that the Green was not the appropriate place for an unattended religious display. There simply is no support for plaintiffs' contention that the record establishes anti-Christian animus and an attempt to quash the dissemination of Christian ideals.[13]

The case before the court is clearly distinguished from Hialeah, 508 US. at 533, 113 S.Ct. at 2227, a free exercise of religion case, where the Court concluded that although health ordinances were facially neutral, they were enacted to suppress religion or religious conduct and thus were subject to a strict scrutiny standard.[14] In Hialeah, all the history pointed to the fact that the legislators intended to prohibit the practice of the Santeria religion. Id. at 534-35, 113 S.Ct. at 2227-28. In the instant case, while the crèche was the motivating factor, there is no evidence of an attempt to preclude the practice of any Christian (or other) religion. In Hialeah, the Court ruled that "[a]part from the text, the effect of a law in its real operation is strong evidence of its object.," and

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[13] At oral argument, plaintiffs pointed to the proposed display regarding the "religious practices of the Crusaders," see note 7, supra, as evidencing an anti-Christian sentiment. This court does not read the statement the same way at all. The writer appeared to be pointing out that history includes examples of conduct undertaken in the name of various religions which is no longer considered acceptable under modern standards. In any event, the statements of one Town resident will not control this court's analysis.

[14] Plaintiffs' free exercise clause argument will be discussed in more detail infra. The free exercise clause "protects against governmental hostility which is masked as well as overt." Hialeah, 508 U.S. at 534, 113 S. Ct. at 2227. As such, in connection with free exercise cases, courts engage in an inquiry similar to the one raised in connection with plaintiffs' free speech argument namely whether the regulations were enacted due to hostility toward the message of the speech.

that, in that case, the large number of exceptions in the regulations created a situation where only the Santeria religion was affected by the regulations. Id. at 535, 113 S. Ct. at 2228. In the instant case, all expressive displays are prohibited — regardless of the message and the subject. The record clearly establishes that, whether acting out of pique or conviction, residents were going to erect other displays if the crèche was allowed to stand unattended. The Regulations apply to all such displays and do not target Christianity. Finally, in Hialeah, the Court cautioned against unequal treatment between religious and secular conduct. Id. at 542-43, 113 S.Ct. at 2232 ("inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation"). In the instant case, the Regulations do not affect only religious conduct, and a case by case analysis of the messages sought to be conveyed was expressly rejected by the Board.

In concluding that the Regulations at issue are content-neutral, this court recognizes that the fact that speech may be considered by some "offensive" and "divisive" does not justify its being treated differently than less controversial speech. See, e.g., Forsyth County Georgia v. Nationalist Movement, 505 U.S. 123, 134-35, 112 S.Ct. 2395, 2403-04, 120 L.Ed.2d 101 (1992) ("[l]istener's reaction to speech is not a content-neutral basis for regulation"; impermissible fees imposed in connection with parade permit where content of speech, and public reaction thereto, considered in setting of amount). See also The Nationalist Movement v. City of Boston, 12 F.Supp.2d 182, 191-92 (D. Mass. 1998) (denial of parade permit due to concerns about public's reaction to parade is not "content neutral" and violates First Amendment where one application treated different than another). There is no question in the present case that

opposition to the crèche motivated the amendment to the Regulations. However, there is still no evidence of an attempt to suppress the "message of the crèche," or that the "message of the crèche" was treated differently than any other message which may have been deemed less controversial. There were no special or different burdens imposed on the plaintiffs' request for a permit to display the crèche: other permit requests had to meet the same criteria.

The plaintiffs rely on Cox v. Louisiana, 379 U.S. 536, 551-52, 85 S.Ct. 453, 462-63, 13 L.Ed.2d 471 (1965), where the Supreme Court held:

> [A] "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment . . . . There is no room under our Constitution for a more restrictive view. For the alter-native would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

(citations omitted). Ironically, this is exactly what the Selectmen apparently intended to encourage in enacting the Regulations. Active and interactive exchanges or ideas are valued — it is the ability to simply put up a display and walk away that the Regulations prohibit.

The First Amendment does not prevent public debate from leading to legislation — in fact, such a result would be completely antithetical to the aims of

the First Amendment. Where, as here, public debate results in content-neutral regulations, the appropriate standard of review is an intermediate level of scrutiny. For the reasons detailed below, the Regulations satisfy that standard.

The Restrictions Satisfy the Intermediate Scrutiny Standard

The fact that the Regulations are content-neutral does not end the inquiry: the restrictions imposed as to the time, manner and place of expression must satisfy the intermediate scrutiny standard. See D.H.L. Assocs., 199 F.3d at 59. Thus, the inquiry "is whether the ordinance is narrowly tailored 'to serve a substantial government interest and allows for reasonable alternative avenues of communication.'" Id. (citing City of Renton, 475 U.S. at 50, 106 S.Ct. at 930, and Clark, 468 U.S. at 293, 104 S.Ct. at 3069). See also Perry, 460 U.S. at 45, 103 S.Ct. at 955, and cases cited. The United States Supreme Court has already suggested that "a ban on all unattended displays," including religious structures, might be "reasonable, content-neutral restrictions." See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753,761, 115 S.Ct. 2440, 2446, 132 L.Ed.2d 650 (1995) (addressing propriety of display of a cross under the Establishment Clause). See also Congregation Lubavitch v. City of Cincinnati, 923 F.2d 458, 460-61 (6th Cir. 1991) (while ban on only religious displays unconstitutional, prohibiting all expressive unattended structures would be reasonable restriction). In the present case, the Regulations do satisfy the intermediate scrutiny standard.

Narrowly Tailored to Serve a Substantial Government Interest

"A content-neutral time, place, and manner restriction is narrowly tailored if it 'promotes a

substantial government interest that would be achieved less effectively absent the regulation.'" D.H.L. Assocs., 199 F.3d at 59 (quoting Ward v. Rock Against Racism, 491 U.S. 781,799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989) and authorities cited). It is well established that while the restriction must be narrowly tailored, "it need not be the least restrictive or least intrusive means" of accomplishing "the government's legitimate, content-neutral interests." Ward, 491 U.S. at 798-99, 109 S.Ct. at 2757-58 (citations omitted). See also Clark, 468 U.S. at 297, 104 S. Ct. at 3071).

In the present case, the government's legitimate, content-neutral interest[15] is to maintain the aesthetic qualities of the Green and, as stated in the Regulations themselves, "to promote the use of the Battle Green in a manner consistent with its nature and history." Enrich Aff, at Exs. B and C at ¶3a. The government has a well-recognized interest in maintaining the beauty of public parks shared by many. See, e.g., Clark, 468 U.S. at 296, 104 S.Ct. at 3070 (government has substantial interest in maintaining parks in the heart of the Capital in an attractive and intact condition); Metromedia, Inc., 453 U.S. at 507-08, 101 S.Ct. at 2892 (improving traffic safety and the appearance of the city are substantial

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[15] Some cases further describe these valid interests as having to be "unrelated to the suppression of free speech." Clark, 468 US. at 294, 104 S.Ct. at 3069; see also United States v. O'Brien, 391 U.S. at 377, 88 S.Ct. at 1679 ("[A] governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free speech; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."). This standard "for validating a regulation of expressive content ..., in the last analysis, is little, if any, different from the standard applied to time, place or manner restrictions." Clark, 468 U.S. at 298, 104 S. Ct. at 3071.

governmental goals); Globe Newspaper Co., 100 F.3d at 187 (ban on newsracks upheld, government has legitimate aesthetic goal of enhancing historic architecture of the District by reducing visual clutter). Thus, it is well settled that "the state may legitimately exercise its police powers to advance esthetic values." Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789,805, 104 S.Ct. 2118, 2129, 80 L.Ed.2d 772 (1984). Moreover, "a government has a more significant interest in the aesthetics of designated historic areas than in other areas." Messer v. City of Douglasville, 975 F.2d 1505, 1510 (11th Cir. 1992) (prohibition of off-premises advertising in historic district upheld). See also Globe Newspaper Co., 100 F.3d at 187.

The present Regulations, which prohibit only the display of unattended structures, do not burden substantially more speech than is necessary to further the governmental interests, and thus are narrowly tailored. Globe Newspaper Co., 100 F.3d at 188. The plaintiffs are free to disseminate the message of the crèche in numerous other interactive ways. See Hill, 530 U.S. at 726, 120 S.Ct. at 2494 ("As we have emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal."). In fact, the crèche itself may be displayed so long as it is in connection with an event. The limited restriction on one specific method of disseminating a message satisfies the requirement that a regulation be narrowly tailored.[16]

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[16] There is no merit to plaintiffs' claim that the Board may arbitrarily enforce the Regulations so as to render them unconstitutional. "A government regulation that allows arbitrary application is 'inherently inconsistent with valid time, place, and manner regulation bemuse such discretion has the potential for

Plaintiffs contend that the Board's concern with maintaining the historic nature of the Green is an after the fact justification for the Regulations. However, the record establishes that the appropriate use of the Green and the manner in which ideas are "displayed" on the Green has been the focal point of the discussion since the beginning.

Plaintiffs do, with justification, take exception to the fact that the defendants are now arguing that the presence of any unattended expressive structure on the Green is incompatible with its historic use and destroys its aesthetic value. See, e.g., Enrich Aff. at ¶¶31-34; Kreiger Aff. at ¶¶6, 7. Since the crèche has been displayed on the Green for 80 years, it is difficult to give credence to the defendants' present description of the harm that is likely to occur if the display is allowed to continue. Nevertheless, the record is clear that the crèche is no longer going to be the only unattended expressive structure placed on the Green by the residents of Lexington. Well-intentioned, and perhaps not so serious requests for permits have already been made. A proliferation of displays would be inconsistent with the historical use of the Green, and would affect its character and appearance. The Board was entitled to consider the requests it actually had received for additional permits as well as its concerns about the likely effect of allowing the continued display of the crèche See, e.g., Renton, 475 U.S. at 50-52, 106 S.Ct. at 930-31 (city can rely on other cities' experiences about the secondary affects of adult theaters in crafting regulations); D.H.L.

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becoming a means of suppressing a particular point of view." Forsyth County Ga., 505 U.S. at 130, 112 S.Ct. at 2401 (citations omitted). That is not the case here. Since all expressive displays are banned, there is no discretion on the part of the Board and thus the regulations are content-neutral. Since the total ban is only on one type of manner of dissemination of information, it is narrowly tailored.

Aeacos., 199 F.3d at 57 (accord). The effect of a large number of unattended displays on the Green is something that the Selectmen could envision without the need for extensive study. According to the plaintiffs, "the Selectmen amended the regulations to ban 'unattended structures' because the defendants considered 'unattended, protracted displays of structures representative of the beliefs or views of private individuals or groups, whether religious, political or otherwise, did not constitute an appropriate use of the Green.'" Plaintiffs' Mem. at 15. The Board is properly charged with making that determination, and its position that the Green has not historically been used as a place for static displays of personal beliefs is supported by the record.[17]

The plaintiffs also challenge the Board's claim to be protecting the historic and aesthetic value of the Green because unattended non-expressive structures, such as bleachers, are allowed on the Green.[18] There is merit to the plaintiffs' contention that the presence of such items on the Green is not expressly recognized in the Regulations. It was, however, clear from the Board's comments prior to the enactment of the Regulations that it intended to allow such unattended structures which were needed as part of authorized uses to be on the Green, and to be there longer than the prescribed 8 hour limit if necessary as a practical matter. It is the enforcing bodies' interpretation of regulations which control when faced with a constitutional challenge. See, e.g.,

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[17] It is worthy of note that virtually all the specified uses of the Green in the Regulations, even before the amendments, create active events and community participation.

[18] Plaintiffs also argue that the Regulations are not being uniformly enforced since the reenactment of the Battle of Lexington did not have a permit in 2001. The Board clearly approved the use of the Green in connection with the annual celebration as evidenced by the minutes.

Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91, 86 S.Ct. 211, 213, 15 L.Ed.2d 176 (1965) (constitutionality of law reviewed in light of narrow construction given to it by the enforcing court); Forsyth County Ga., 505 U.S. at 131, 112 S.Ct. at 2402 (in evaluating challenge to regulations, must consider county's authoritative constructions of the ordinance, including its own implementation and interpretation).

In any event, there is a qualitative difference between unattended structures which accompany active conduct and enable people to present and participate in events, and permanent structures which display their message without human participation. The limited use of unattended structures such as bleachers does not alter the defendants' legitimate concern with the historic and aesthetic value of the Green as a matter of fact. And, as a matter of law, the fact that absolutely every offending structure has not been banned dues not render the Regulations unconstitutional. See, e.g., Globe Newspaper Co., 100 F.3d at 185, 191 (fact that public street furniture allowed but newsracks prohibited does not render regulations unconstitutional; even though some blight remains, the partial, content-neutral ban enhanced city's appearance). In Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), the Supreme Court held that an ordinance prohibiting posting of signs on public property was not unconstitutional as applied to expressive activities of a group of supporters of a political candidate. The ban was upheld on the grounds that the state was advancing aesthetic values, and since "it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape," the ordinance curtailed no more speech than necessary to accomplish its purpose by banning the signage but allowing alternative methods of distribution. 466 U.S.

at 810-12, 104 S.Ct. at 2131-33. For the same reasons, the instant regulations are sufficiently narrowly tailored to meet a legitimate governmental interest.

Reasonable Alternative
Avenues of Communication

It is undisputed that plaintiffs are free to display the crèche on the Green, provided that it is part of an event, and that they are free to disseminate the message of the crèche in other forms consistent with the new Regulations. It is further undisputed that the plaintiffs may display the crèche as an unattended display on church lawns directly across the street from the Green. Enrich Aff. at ¶46. Nevertheless, plaintiffs argue that there are no reasonable alternative avenues of communication of the message of the crèche As the plaintiffs contend:

> Display of the crèche on the Lexington Green is crucial to the plaintiffs' expressive message: the Green was the site of a momentous event in the Nation's history, and plaintiffs wish to communicate their belief that the Nation's struggle for independence is connected to the religious significance of Christmas, The struggle of the Minutemen on Lexington Green represents to the plaintiffs the initiation of a long and arduous war that culminated in the guarantees of free religious exercise and expression, as represented by the Nativity Scene's placement in the public forum.

Plaintiffs' Mem. at 18. Plaintiffs' argument must fail because they are still free to communicate their belief that the "religious significance of Christmas" is connected to the Green — they simply cannot convey the message through the placement of an unattended crèche on the Green, Live nativity scenes, religious

services, prayer vigils and the like continue to be allowed and do take place on the Green.

The sentiments expressed by the plaintiffs that the Green is a special place which exemplifies the values which form the foundation of the United States and its Constitution is a sentiment shared by many from differing backgrounds, walks of life, political, religious and other beliefs. The Board has acknowledged this and encourages the Green's continued use as a center for the dissemination of ideas. All that the Board has dune is regulate, in an even-handed, content-neutral way, the time, place and manner of the exercise of plaintiffs' rights of free speech.

This case involves the "use of a privately owned structure placed on public property for which there are ample alternative channels available for the distribution" of the crèche's message. Globe Newspaper Co., 100 F.3d at 192. Ample alternative channels exist where, as here, the "ordinance did not affect any individual's right to exercise the right to speak and distribute literature in the same place where the posting of signs [or display of unattended structures] is prohibited." Id. at 193 (citing Vincent, 466 U.S. at 812, 104 S. Ct. at 2132-33). While the First Amendment guarantees the right to disseminate ideas, "it does not guarantee the right to do so through private structures erected on public property." Id. at 195.

For all these reasons, the new Regulations do not violate plaintiffs' rights of free speech.

B. Free Exercise Clause

Plaintiffs also argue that the Regulations violate the Free Exercise Clause found in the First Amendment. Relying on Hialeah, plaintiffs argue that the object of the Regulations was to suppress religion or religious conduct, and was therefore unconstitutional. See Plaintiffs' Mem. at 7-10.

For the reasons detailed above, the record does not support the plaintiffs' description of the purpose of the Regulations. Even more importantly, however, this argument must fail because the "Free Exercise Clause is not implicated here." Strout v. Albanese, 178 F.3d 57, 65 (1st Cir, 1999) (upholding constitutionality of law which authorizes grants to private schools provided they are "non-sectarian" in nature). The inquiry in a free exercise analysis is "whether government has placed a substantial burden on the observation of a *central belief or practice.*" Id. (quoting Hernandez v. Commissioner, 490 U.S. 680,699, 109 S.Ct. 2134, 2148, 104 L.Ed.2d 766 (1989). See also Hialeah, 508 U.S. at 534-35, 113 S.Ct. at 2227-28 (even though regulations refer to any and all religious groups - the record "compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances.") (emphasis added). In the instant case, plaintiffs have admitted that the display of the crèche on the Green is not an integral part of their ability to exercise their religion. There is nothing in the, regulations which in any way interferes with the plaintiffs' ability to practice their faith.

CONCLUSION

For all of the reasons detailed herein, this court recommends that the plaintiffs' motion for summary judgment (Docket #43) be DENIED; and that the defendants' motion for summary judgment (Docket #40) be ALLOWED.[19]

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[19] The parties are herby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of the Report and Recommendation. The written objections must specially identify the portion of the

/s/
Judith Gail Dein
United States Magistrate Judge

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proposed findings recommendations or report to which objection is made and the basis for such objections. The parties are further advised that the Untied States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Sec'y of health & Human Servs., 848 F.2d 271, 275 (1st Cir. 1988); United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 604-605 (1st Cir. 1980); see also Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466 (1985). Accord Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 3-4 (1st Cir. 1999); Henley Drilling Co. v. McGee, 36 F.3d 143, 150-151 (1st Cir. 1994); Santiago v. Canon U.S.A., inc., 138 F.3d 1, 4-5 (1st Cir. 1998).

APPENDIX E

RULES AND SPECIFICATIONS REGULATING THE USE OF THE BATTLE GREEN

The following rules and regulations have been adopted in accordance with the General By-Law, Article XXV, Section 225, "Protection of the Battle Green", as amended. If these regulations or portions thereof, conflict with the By-Law, the By-Law shall take precedence.

DEFINITIONS

1. a. "Audio device" means any radio, television set, musical instrument, or other device that produces noise.

   b. "Disorderly conduct" means any action intended to cause inconvenience, annoyance, or alarm, or which recklessly creates a risk thereof; fighting, threatening or violent behavior; unreasonable noise; abusive language directed toward any person present; wrestling in vicinity of others; throwing of breakable objects; throwing of stones; or spitting.

   c. "Powerless flight" means any device used to carry persons or objects through the air; for example, sailplanes, gliders, balloons, body kites, hand gliders.

   d. "Public use limit" means the maximum number of people or the amount, size, or type of equipment permitted on the Battle Green at one time, as established by the Board of Selectmen.

   c. "Special event" means demonstrating, picketing, speechmaking, marching, holding of vigils, and all other similar forms of conduct which involve the active communication or

expression of opinions or grievances, engaged in by one or more persons, the conduct of which has the effect, intent or propensity to draw a crowd or onlookers.

f. "Wet turf" shall mean any natural condition that would make the Green vulnerable to excessive damage by heavy wear or use; for example, heavy rains, reseeding, drought conditions.

g. "Non-permit activities" shall mean activities that may be engaged in without a permit issued by the Board of Selectmen.

NON-PERMIT ACTIVITIES

2. Subject to the restrictions in these rules and regulations, permits shall not be required for:

a. Conduct that does not cause public inconvenience, annoyance, or alarm.

b. Picnicking restricted to benches only and to groups of no more than five people. Picnicking on the Green by bus tours or similar groups is forbidden.

c. The gathering of groups on the Battle Green for the sole purpose of exploring and enjoying its history, and which do not remain for more than four hours.

d. Playing of audio devices at a reasonable volume.

e. The playing of games that do not:

1. exceed three players; or

2. damage the Green's physical condition; or

3. disturb or inconvenience those visiting the Green for historic interest; or

4. constitute any type of disorderly conduct.

PERMIT REQUIRED ACTIVITIES

3. a. The purpose for requiring permits for certain activities is to promote the use of the Battle Green in a manner consistent with its nature and history; to protect the Battle Green from harm; to ensure adequate notice of the event so that arrangements can be made to protect the public health and safety and to minimize interference with the event by the public.

   b. Permits are required for any of the following activities, singly or in combination:

      1. Any group activity reasonably likely to exceed the public use limit established by the Board of Selectmen.
      2. Special events, public meetings, assemblies, gatherings, demonstrations, parades, and other active public expressions of opinion.
      3. Pageants, reenactments, regattas, entertainments, or other as public spectator attractions.
      4. Displays of a religious or ceremonial nature.
      5. Use of public address system, electrical lighting, or other electrical devices.
      6. Distribution of printed matter other than commercial advertising.
      7. Possession of firearms if unloaded or packed in such a way as to prevent their use.
      8. Possession of explosives, as long as individuals or groups conform to Federal,

State, and local laws governing such possession.

9. Use or possession of fireworks or firecrackers.

IMPERMISSIBLE ACTIVITIES

4. The following activities are strictly prohibited:
   a. Any group activity that exceeds the public use limit established by the Board of Selectmen for the Battle Green.
   b. Possession, destruction, injury, defacement, removal, or disturbance of any building, sign, equipment, monument, statue, marker, animal or plant.
   c. Distribution or display of commercial advertising; or soliciting of business; or any other commercial transactions.
   d. Remaining on the Battle Green for more than four hours.
   e. Abandonment of any vehicle or personal property.
   f. Unreasonably loud operation of audio devices.
   g. Delivery of any person or thing by parachute or helicopter.
   h. Powerless flight activities.
   i. Begging.
   j. Disorderly conduct.
   k. Use of firearms.
   l. Use of metal detecting device for personal use.
   m. Gambling of any form or operation of gambling devices.
   n. Picnicking except as provided in 2b.
   o. Use of roller skates and skateboards.

Approved by the Board of Selectmen July 15, 1986

Supreme Court U.S.
FILED
APR 4 2002
OFFICE OF THE CLERK

(2)

No. 01-1271

IN THE

Supreme Court of the United States

KNIGHTS OF COLUMBUS, COUNCIL #94, LEXINGTON, MASSACHUSETTS, *et al.*,

Petitioners,

v.

TOWN OF LEXINGTON, *et al.*,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the petitioners' First Amendment rights of freedom of speech and religious expression were violated by the denial of a permit to display an unattended nativity scene for five weeks on the Lexington (Massachusetts) Battle Green when the display would violate a regulation prohibiting all "unattended structures" on the Green; the regulation applies to all unattended structures, without regard to the content or message of any speech conveyed by the structure; the regulation was enacted solely to advance the legitimate government interests of protecting the historic and aesthetic qualities of the Green and to guard against the secondary effects of unattended structures; and the regulation not only permits the display of the nativity scene on the Green for more limited periods of time but also leaves open ample alternative means for the petitioners to communicate their message in the Town of Lexington, both on and off the Green.

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General By-laws of the Town of Lexington, Article XXV, § 25 2

Mass. Gen. L. c. 9, §§ 26-27C 2

OPINIONS BELOW

In addition to the opinions cited by the petitioners, the Court of Appeals denied the petitioners' request for emergency injunctive relief and expedited appeal. *Knights of Columbus* v. *Town of Lexington*, No. 00-2539 (CA1 Dec. 20, 2000) (order denying injunction pending appeal and request for expedited appeal).

COUNTER-STATEMENT OF THE CASE

Petitioners Knights of Columbus and Grand Knight Michael O'Sullivan (together, the "Knights") applied for a permit to display a nativity scene, or crèche, on the Lexington (Massachusetts) Battle Green for a five-week period during the 2000-2001 Christmas season. Respondents the Lexington Board of Selectmen (together with the Town of Lexington, the "Board") denied the permit because the display would constitute an "unattended structure" in violation of the Rules and Specifications Regulating the Use of the Battle Green (the "Rules").

1. Relevant Facts.

a. The Battle Green.

The first battle of the Revolutionary War occurred on April 19, 1775, at the green on Lexington Common, now known as the Lexington Battle Green. Seven of the eight Minutemen killed during the battle are buried there. The famous Minuteman Statue is the focal point of the Green, commemorating the heroic efforts of American colonists who fought in the Revolutionary War. The Green is a National Historic Landmark and is listed in the National Register of Historic Places, pursuant to the National Historic Preservation Act of 1966, 16 U.S.C. §§ 470, *et seq*. The Green

also is listed in the Massachusetts State Register of Historic Places and designated as a Local Historic District, pursuant to Mass. Gen. L. c. 9, §§ 26-27C. R. 74.[1]

b. The Traditional Uses of the Green and the Board's Role in Regulating Them.

In addition to its importance as an historic site and place of interest for tourists and local residents, the Green traditionally has been used for the active expression of political, religious and other views. Such speech on the Green has included protests, rallies, demonstrations, reenactments, prayer vigils and church services. R. 83-84. Perhaps the best known use of the Green is the annual re-enactment of the Battle of Lexington, which takes place every April. In the recent past, the Green has been used for Easter Sunrise Services, weddings, a prayer rally for the National Day of Prayer, a demonstration against commercial flights at a local air force base, a rally in support of a labor strike and for a variety of other purposes. R. 75.

The Board is charged with the protection of the Green under the General By-laws of the Town of Lexington, Article XXV, § 25. The By-laws require the Board to promulgate "regulations that define both the standards and procedures by which [the Board] will grant or deny permits" for the use of the Green. R. 74, 91. Pursuant to this authority, the Board enacted the Rules, allowing certain casual uses of the Green without a permit, but requiring permits for special events and other group activities. The Rules state that permits are required in order

> to promote the use of the Battle Green in a manner consistent with its nature and history; to protect

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1. References to the Record Appendix filed in the Court of Appeals will appear in the form of "R. __."

> the Battle Green from harm; to ensure adequate notice of the event so that arrangements can be made to protect the public health and safety and to minimize interference with the event by the public.

R. 74-75, 94.

c. The Crèche's Longstanding Favored Treatment by the Town.

For most of the past 80 years, a crèche has been erected on the Green each Christmas season, immediately behind the Minuteman statue. For many years after World War II, the Town was responsible for maintaining, erecting and storing the crèche, and effectively was the owner of it. In the early 1970s, after Lexington citizens and clergy raised concerns about the appropriateness of the Town's role in sponsoring the crèche, the Board transferred ownership, possession and maintenance of the crèche to two fraternal orders in the town, the Knights and the Simon W. Robinson Lodge, Ancient Free and Accepted Masons (the "Masons"). R. 75-76.

However, the crèche still continued to enjoy preferred treatment by the Town. At the same time that the Board transferred ownership of the crèche, it also granted the new owners what amounted to a special license to erect the crèche on the Green every Christmas season. Although the Board's Rules, beginning in the early 1980s, required a permit for displays of this nature, the Town continued to afford the crèche special treatment by allowing it to be erected each year without a permit.[2] R. 76, 99.

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2. Prior to 1982, the By-laws required applicants to receive written permission from the Board. The Knights and Masons never sought or received such permission. R. 76.

d. The 1999 Permit for the Crèche.

While the crèche long had been a source of controversy in the Town, by the late 1990s its annual presence on the Green had become increasingly divisive. Many people in the Town viewed the special status given to the crèche, and its prominent and extended placement on the Green, as an endorsement of Christianity by the Town. In response to this concern, the leaders of several local churches and other interested citizens worked to arrive at a consensus about whether the crèche should continue to be displayed on the Green. That effort, however, was unsuccessful. R. 76-78.

In 1999, the Board attempted to end the special treatment afforded the crèche by requiring the issuance of a permit. The Board voted on October 18, 1999, to issue a three-week permit for the crèche, even though Board members were concerned that allowing the crèche to be placed on the Green might be viewed as a public endorsement of religion, and that the placement of such a structure for an extended period of time, unaccompanied by any actual event, was not an appropriate use of the Green in view of its traditional use as a forum for active expression. R. 78-79, 197.

e. Proposals for Other Structures on the Green.

Later in the fall of 1999, the Board received four permit applications from groups or individuals seeking to erect structures on the Green. These subsequent applications were motivated at least in part by a desire to protest or counter the crèche display. R. 79-82, 198.

(1) Sign Protesting the Crèche.

Shortly after the Board voted on October 18, 1999, to issue the three-week permit for the crèche, the Board received a permit application for the display of a 4-foot by 8-foot sign

protesting the extended placement of the crèche on the Green. Although the Board recognized that such a sign would be extremely controversial and divisive, the Board understood that it could not decide whether to grant the permit based on the content of the sign. The Board denied the permit application because the sign was prohibited by the Town's zoning by-laws. R. 79-80.

(2) Witchcraft and Sun God Structures.

The Board also received a single permit application for two separate structures to be displayed on the Green, one for the month of April 2000 and one for the month of October 2000. For April 2000, the application requested a permit for a four-week display of a pyramid in honor of the ancient Egyptian Sun God, Ra. For October 2000, the application requested a permit for a four-week Halloween display containing the figures of a witch, a skeleton and a ghost in celebration of Witchcraft, which the applicants described as a "religion recognized in Massachusetts since the Salem Trials." The Board requested more information about the design, size and appearance of these structures at its November 22, 1999, meeting. Because the applicants never provided the additional information requested, the Board never voted on these permit applications. R. 80-81.

(3) A Sukkah.

In November 1999, a Lexington resident submitted an application for a permit to place a sukkah on the Green in honor of the Jewish holiday of Sukkoth, which is a harvest celebration and a remembrance of the wanderings of the ancient Israelites. The application indicated that the sukkah, an open hut-like structure, would be 8 feet wide, 14 feet long and 8 feet high, and would be placed in a prominent location on the Green between the Minuteman Statue and the flagpole

for 12 days the following October. The Board did not act on this application, and the applicant has not pursued it, because both understand that the application is inconsistent with the amendments prohibiting the placement of unattended structures on the Green. R. 81-82, 145.

(4) Other Potential Permit Applications.

In addition to these formal permit applications, Board members also were made aware of potential permit requests that were contemplated for: (1) a commemoration of Mayan or Aztec religious festivals; (2) a commemoration of the religious practices of the Crusaders; (3) a statue of the comedian Flip Wilson in honor of the "Church of What's Happening Now"; and (4) the placement of a herd of live cows on the Green in honor of the Hindu religion. R. 82, 147-48.

The Board understood that some or all of these potential applications were not serious, and that the prospective applicants had no desire actually to erect such structures on the Green. However, the Board also realized that if it granted a permit for the crèche, it also would be required to permit these other displays on the Green. The Board understood that it was required to treat all viewpoints in exactly the same manner, including expressions of protest against religious, political or commercial speech. R. 82.

f. The Challenged Amendments.

The foregoing permit applications, both actual and potential, underscored the Board's existing belief that the placement of a structure on the Green for an extended period of time, in the absence of an accompanying event, is not an appropriate use of the Green and is not consistent with the historic nature of the Green. While this concern was

articulated in the context of discussions about the crèche and the applications for other structures, the Board did not oppose the substance or content of the structures that would be displayed on the Green. It was instead the length of time and manner in which they would be displayed that was problematic. The Board did not want the Green to become a display area for structures, be they religious, political, commercial or otherwise. R. 83, 198.

Therefore, on July 24, 2000, the Board voted to amend the Rules in two pertinent respects. First, the amended Rules limit the duration of events held on the Green. Specifically, the Board must issue a permit for "[s]pecial events,[3] public meetings, assemblies, gatherings, demonstrations, parades, and other active public expressions of interest [on the Battle Green], not to exceed eight hours in duration" and for "[d]isplays of a ceremonial nature in connection with special events and limited in duration to the period required for such events." Second, the Rules now prohibit "[p]lacement on the Battle Green of any unattended structure" by private parties.[4] R. 94-95.

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3. A "special event" is defined as "demonstrating, picketing, speechmaking, marching, holding of vigils, and all other similar forms of conduct which involve the active communication or expression of opinions or grievances, engaged in by one or more persons, the conduct of which has the effect, intent, or propensity to draw a crowd or onlookers." R. 93.

4. While the language of the amendment that the Board approved prohibits the "placement on the Battle Green of any unattended structure by any private party," R. 157, the Rules as published mistakenly omit the words "by any private party." R. 95.

g. The Knights' Permit Application and the Board's Alternative Suggestion.

On October 19, 2000, the Knights submitted a permit application to erect and display a crèche on the Green from December 3, 2000 to January 6, 2001. Displaying the crèche continuously over the course of five weeks would violate the prohibition against the placement of any unattended structure on the Green by a private party. Accordingly, at the October 30, 2000 meeting of the Board, the Board constructively denied the permit application. R. 86-87.

The Board, however, suggested an alternative. At the same meeting, Selectman Peter Enrich invited the Knights to amend their application to conform to the Rules. Specifically, he indicated that the Board would approve a permit application for an eight-hour event that included a display of the crèche because that would be consistent with the Rules. The Knights declined to amend their permit application. R. 87, 193-95. The Knights also rejected an invitation from a nearby church to display the crèche on its property directly across from and in public view of the Green. R. 201.[5]

2. Procedural Background.

The Knights filed suit in the United States District Court for the District of Massachusetts in November 2000, alleging that the Board's amendments prohibiting unattended structures on the Green were enacted for the sole purpose of inhibiting the Knights' exercise of religious expression. The Knights moved for preliminary injunctive relief to

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5. The Board also has granted a permit to conduct a series of rallies protesting the exclusion of the crèche from the Green, as well as for a "live" nativity (a recreation with role-players in costume) and accompanying religious service. R. 86, 207.

require the Board to allow the display of the crèche. On December 6, 2000, the District Court issued an Order and Memorandum denying the Knights' motion for preliminary injunction. R. 268. The District Court found that the Knights were not likely to succeed on the merits because the amendments constituted a content-neutral time, place and manner restriction narrowly tailored to serve a substantial government interest and allowed for reasonable alternative avenues of communication. R. 269.[6]

Following discovery, the parties filed cross-motions for summary judgment in the District Court. On October 10, 2001, the District Court issued an Order of Dismissal denying the Knights' motion for summary judgment and granting the Board's motion for summary judgment. The District Court held that the amendments constituted a content-neutral time, place and manner restriction, narrowly tailored to serve a substantial government interest. R. 36-42. Specifically, the court found that the "record does not support [the Knights'] claim that the Regulations were enacted due to hostility toward the message of the crèche." R. 32. The District Court also held that the amendments did not violate the Knights' rights to free exercise of religion. R. 44.

The Knights appealed to the First Circuit Court of Appeals, and the appeal was briefed and heard on an expedited basis in advance of the 2001-2002 Christmas season. On November 29, 2001, the First Circuit issued a

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6. On December 11, 2000, the Knights filed an emergency motion for a preliminary injunction pending appeal and a motion for expedited appeal in the United States Court of Appeals for the First Circuit. A week later, the Court of Appeals, "[a]fter careful review of the record and the parties' submissions," denied the Knights' request for an injunction "essentially for the reasons set out by the district court," and also denied the motion for expedited appeal. *Knights of Columbus* v. *Town of Lexington*, No. 00-2539 (CA1 Dec. 20, 2000).

decision affirming the District Court's decision. The Court held that "the record shows beyond hope of contradiction that the ban on unattended structures is a content-neutral restriction on the time, place, and manner of speech, narrowly tailored to achieve a significant governmental interest and framed so as to allow access to ample alternative avenues of communication." *Knights of Columbus* v. *Town of Lexington*, 272 F.3d 25, 28 (CA1 2001).

REASONS FOR DENYING THE WRIT

The question presented by the Knights' petition raises no new issue for this Court. The prohibition against unattended structures at issue here presents a garden-variety time, place and manner restriction. Indeed, this Court already has recognized such a prohibition against unattended structures to be an inherently neutral time, place and manner restriction.

In this case, both the District Court and the Court of Appeals — each on two separate occasions — thoroughly examined the amendments and the record of their enactment and found no evidence whatsoever that the amendments were content-based. There is no reason for this Court to undertake a review of the record yet again, as the Knights urge in their petition. The Board's decision to amend the Rules stemmed from legitimate concerns about the historic and aesthetic qualities of the Green, not from any disagreement with the message of the crèche or from a desire to appease citizens protesting the crèche. The amendments to the Rules are narrowly tailored to serve significant government interests and allow the Knights ample alternative means to communicate their message.

I. The Rules Are a Classic Content-Neutral Time, Place and Manner Restriction.

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Hill* v. *Colorado*, 530 U.S. 703, 719 (2000) (quoting *Ward* v. *Rock against Racism*, 491 U.S. 781, 791 (1989)). As this Court recently made clear in *Hill*, the test for content-neutrality can be satisfied in several different ways. First, a regulation can be upheld as content-neutral if it is not a "regulation of speech" but rather is a "regulation of the places where some speech may occur." 530 U.S. at 719. Second, a regulation can be upheld if it applies to all speech, regardless of viewpoint, and makes no reference to the content of the speech. *Id.* Third, a regulation is "'content neutral' if it is justified without reference to the content of regulated speech." *Id.* at 720.

As both the District Court and Court of Appeals repeatedly found, the amendments at issue here meet these and any other variations of the test for content-neutrality.

The amendments are not "a regulation of speech," but rather a "regulation of the places where some speech may occur." *Id.* at 719. The amendments do not prohibit the Knights' speech — or Christian speech more generally, or religious speech more generally still — either on the Green or elsewhere in the Town of Lexington. Rather, the amendments regulate only one particular public place where speech may occur — the uniquely historic Battle Green. Moreover, the amendments regulate the use of the Green *not* on the basis of the content of any speech, but solely on the basis of the time and manner of such expression. Specifically, the amendments limit events to eight hours in duration, and

allow the use of structures only in connection with such permitted events. R. 83-84, 198-99. The amendments apply to all speech, regardless of viewpoint, and make no reference to the content of the regulated speech.

Indeed, as a majority of this Court and various courts of appeals already have recognized, a content-neutral ban on all unattended structures is an inherently reasonable time, place or manner restriction. *See Capitol Sq. Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 761 (1995) ("a ban on all unattended displays . . . might be one such" reasonable time, place, or manner restriction); *id.* at 783 (Souter, J., concurring) ("I also want to note specifically my agreement with the Court's suggestion that the State of Ohio could ban all unattended private displays in Capitol Square if it so desired"); *id.* at 803 (Stevens, J., dissenting) ("the Court correctly recognizes that a State may impose a ban on all private unattended displays in such a forum"). *See also Wells* v. *City and County of Denver*, 257 F.3d 1132, 1149 (CA10 2001), *cert. denied*, 1225 S. Ct. 469 (2001) (city's ban on private unattended displays upheld as a content-neutral time, place or manner restriction); *American Jewish Congress* v. *City of Beverly Hills*, 90 F.3d 379, 384 (CA9 1996) ("the City constitutionally could ban all unattended private displays in its parks"); *Lubavitch Chabad House, Inc.* v. *Chicago*, 917 F.2d 341, 347 (CA7 1990) (there is no "private constitutional right to erect a structure on public property" because "[i]f there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures").

Finally, the amendments have the purpose of controlling the secondary effects resulting from the protected expression, rather than inhibiting the protected expression itself. *See Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986). *See also D.H.L. Associates* v. *O'Gorman*, 199 F.3d 50, 57

(CA1 1999). In other words, the amendments are content-neutral because they are "justified without reference to the content of the regulated speech," *Hill*, 530 U.S. at 720, the "regulated speech" here being any speech involving the use of unattended structures. The Board enacted the amendments in July 2000 to protect the historic and aesthetic qualities of the Green, and to guard against the secondary effects of unattended structures, only *after* it had received permit requests for a variety of other structures. R. 79-82, 84-85, 198. The Board enacted the amendments not for the purpose of banishing the crèche, but only after it became clear that continuing to allow the crèche, or any other religious display, would result in a barrage of competing structures that not only would be inconsistent with the historic function of the Green as a forum for active expression, but also would significantly impair the Green's important historic and aesthetic qualities. R. 83-84.

The Board's concern about clutter on the Green and its intent to amend the Rules to apply equally to all unattended structures was evident at the time the decision to amend the Rules was made. As Board member Peter Enrich stated at the July 24, 2000, meeting:

> To my mind, nothing could be less appropriate than for us to review individual organizations' proposals for individual structures expressing particular points of view on a case-by-case basis. . . . I think we need to do something that is uniform, that is neutral with respect to viewpoint and that treats all groups exactly alike. I think that's tremendously important.
>
> * * *
>
> I think what we're trying to do is to articulate [the] neutral grounds that will guide our future

> decisions . . . [W]hat we're saying is: Anything of this sort, whether it be a crèche; a menorah; a pyramid to the sun god, Rah [sic]; a political sign for a candidate; an advocacy of atheism, that any of those will be forbidden uniformly and without any attention to the viewpoint . . . of the presenter.

R. 168-69. *See also* R. 198, 206 (Selectman Jeanne Krieger at the July 10, 2000 Board meeting: "I think that a step that would allow us to restrict activities on the common to those that are associated with actual events with people on the Green expressing their opinions is the appropriate use of the common and . . . I think that's appropriate from the historical context as well.").

In approving the ban on unattended structures, the Board thus did not target the Knights, the crèche itself, or any particular viewpoint. Nor did the Board discriminate on the basis of the content of any protected speech. Rather, the Board's interests in preserving the historic and aesthetic qualities of the Green prompted the passage of content-neutral regulations generally applicable to all speakers and all points of view.

There is no reason for this Court to parse the record yet again to look for content-based motives that do not exist. The record here does not remotely support the Knights' allegations that the amendments were enacted for the purpose, or with the inevitable effect, of singling out and stifling any particular speech, whether symbolized by the crèche or otherwise.

With respect to religious speech generally, the Knights themselves claim that the Green regularly is used for all manner of religious exercises. R. 232-33. None of these religious activities would be prohibited by the amended Rules.

With respect to the Knights' particular religious expression, the undisputed evidence also refutes any notion that the Board's actions have been content-based. The Board allowed the Knights' 1999 petition, prior to the enactment of the unattended structure rule. R. 78. The Board granted a permit for demonstrations protesting the absence of the crèche on the Green. The Board also invited the Knights to seek an eight-hour permit for an event with the crèche, and has suggested that the Knights apply for a permit to display the crèche during three separate eight-hour events in successive weeks during the Christmas season.[7] R. 86-88.

No Board motivated to stifle the Knights' expression would have unilaterally offered such suggestions for ways in which that expression could be accommodated. On that record, there is no principled basis for concluding that the enactment or enforcement of the amendments was content-based. *See McGuire* v. *Reilly*, 260 F.3d 36, 44 (CA1 2001) (fact that facially neutral regulation results in restriction of speech of a particular group does not mean that the restriction "results from a fundamental disagreement with the *content* of their expression," particularly where the government has made "every effort to restrict as little speech as possible while combating the deleterious secondary effects" of the restricted speech) (emphasis added). This Court could only reach the same inescapable conclusion.

II. The Amendments Do Not Constitute A "Heckler's Veto."

The Knights' claims against the Board have morphed over time but at each turn have been soundly rejected by the courts below. At the outset of this litigation, the Knights failed to persuade the District Court that the Board had sought to

7. The Board also granted a permit to the Knights' supporters for the performance of a "live" nativity and service on December 23, 2000. R. 207.

silence the message of the crèche. In the First Circuit, the Knights shifted the focus of their claims to argue, in addition to their original claims, that the Board had applied the Rules inconsistently. They again failed. In the latest incarnation of their claims, the Knights argue in this Court that the Board's amendments amounted to a "heckler's veto." This Court need not entertain yet another spin on a claim that is baseless at its core.

There is no evidence to support the Knights' claim that the amendments were passed by the Board to capitulate to threats of disruption. The Board amended the Rules with the understanding that times had changed and the crèche no longer would be the only structure on the Green. It was of no significance to the Board whether the other structures constituted political speech or satire, such as the pyramid to the Sun God Ra, or more "serious" religious speech, such as the Sukkah. In either case, the Board understood that it would have to allow all such structures to be erected. It could not, as the Knights suggest, "treat each request separately." Petition p. 16. It was the Board's legitimate concern about the secondary effects of clutter on the Green that motivated the amendments, not fear of listeners' reactions.[8]

The gist of the Knights' claim is that because the Rules were amended in response to the controversy surrounding the proposed erection of the crèche, they are inherently

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8. In any event, while the government cannot suppress speech solely on the basis that it is offensive to some, such offensiveness can be an appropriate factor when weighed along with other legitimate government interests. This Court has "repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" *Hill*, 530 U.S. at 718. This Court's "cases do not support [the] view" that it is "unconstitutional" to "recogniz[e] any of the interests of unwilling listeners — let alone [to balance] those interests against the rights of speakers. . . ." *Id.* (citations omitted).

content-based. But this case is no different than any other in which new legislation is prompted by debate about a particular issue. This Court long has recognized that it is unrealistic to expect that time, place and manner restrictions will be enacted in a vacuum. Indeed, the enactment of time, place and manner restrictions inevitably will be the result of some particular speech, and that fact alone does not make the regulation void or even inherently suspicious. *See Hill*, 530 U.S. at 724 ("[T]he contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support."); *Frisby* v. *Schultz*, 487 U.S. 474, 488 (1988) (upholding constitutionality of ordinance prohibiting picketing of individual dwelling where ordinance was passed specifically in response to picketing of homes by abortion protesters). *See also McGuire*, 260 F.3d at 45 (where the government engages in a "content-neutral effort to combat secondary effects" of a particular form of speech, the fact that a regulation may have been adopted in direct response to the negative impact of that speech does not render the regulation content-based). As the District Court in this case stated, "[t]he First Amendment does not prevent public debate from leading to legislation — in fact, such a result would be completely antithetical to the aims of the First Amendment." R. 36.

III. The Amendments Are Narrowly Tailored to Serve Significant Government Interests and Allow Alternative Avenues of Communication.

It is well established that preserving the historic and aesthetic qualities of a public forum constitutes a significant government interest for purposes of analyzing the reasonableness of a time, place or manner restriction. *See, e.g., Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (upholding a ban on camping in Lafayette Park because the state has a significant government interest in maintaining national parks in an attractive and intact condition and making the parks

available to tourists); *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values."); *Globe Newspaper Co.* v. *Beacon Hill Architectural Comm'n*, 100 F.3d 175, 187 (CA1 1996) (recognizing aesthetics as a significant government interest justifying a ban on newspaper distribution boxes from the public streets of the Beacon Hill historic district); *Messer* v. *City of Douglasville*, 975 F.2d 1505, 1510 (CA11 1992), *cert. denied*, 508 U.S. 930 (1993) (recognizing aesthetics as a significant government interest justifying a ban on signs directing attention to a building, product, or service not connected to the location of the sign, in the historic district of the city).

Moreover, a content-neutral time, place, and manner restriction is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (quoting *United States* v. *Albertini*, 472 U.S. 675, 689 (1985)). While a reasonable time, place, or manner restriction must be narrowly tailored to serve the government's legitimate, content-neutral interests, "it need not be the least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798.

The amendments at issue are narrowly tailored to the Board's interests in preserving the overall appearance and historic significance of the Green because they directly remedy the specific problem the Board sought to address, namely the placement of unattended structures on the Green for extended periods of time. *See Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 792-93 (1984) (ban on signs posted on public utility poles was narrowly tailored to serve the government's interest in aesthetics because the ordinance directly resolved the problem the city sought to address, the particular medium of expression).

The ban on unattended structures in this case is narrowly tailored because it prohibits only a single manner of expression, and does not prevent the Knights from conveying their message either by using their structure for a limited period of time, or through another manner of expression.

Finally, reasonable alternative channels exist through which the Knights can express, and audiences can receive, the Knights' message. R. 88. In assessing whether the amendments provide alternative avenues of communication, the question is not whether a degree of curtailment of speech exists, but rather whether "the remaining communicative avenues are inadequate." *Ward*, 491 U.S. at 802. *See also D.H.L. Associates*, 50 F.3d at 59 (quoting *National Amusements* v. *Town of Dedham*, 43 F.3d 731, 745 (CA1 1995)). Here, the amendments leave open ample alternative channels of expression for the Knights both on and off the Green.

The amended Rules allow the Knights to erect a crèche on the Green, provided the display is in connection with an actual event lasting at most eight hours. Indeed, the Board invited the Knights to apply for such a permit, either for a single event or for a series of events in successive weeks during the Christmas season. R. 87-88. The Knights also can use the Green to convey their message through other manners of expression, all in the same location that the crèche historically has occupied. R. 94, 199.

In addition, the Knights have reasonable alternative locations for the crèche to the extent they insist that it must be displayed for a protracted period of time. There are two churches bordering the Green, at least one of which has offered the use of its property for the display of the crèche. R. 88, 201. The Masons' property also is located directly adjacent to the Green, with a lawn sufficient to display the

crèche in prominent public view. R. 88. The existence of such alternative channels of communication on private property is a relevant consideration. *See, e.g., Plain Dealer Pub. Co.* v. *City of Lakewood*, 794 F.2d 1139, 1147 (CA6 1986) (upholding ban of all news racks in residential areas as reasonable time, place or manner restriction).

CONCLUSION

For the reasons stated, respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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No. 01-1271

Supreme Court, U.S.
FILED
APR 16 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KNIGHTS OF COLUMBUS, COUNCIL #94, LEXINGTON, MASSACHUSETTS, *et al.*,

Petitioners,

v.

TOWN OF LEXINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS REPLY TO RESPONDENTS BRIEF IN OPPOSITION

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April 16, 2002

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ARGUMENT

The Appellants hereby reply to the Appellee's Brief in Opposition, as follows.

I. HECKLER'S VETO WAS CONTENT BASED AND NOT NEUTRAL.

The District Court found and the United States Court of Appeals for the First Circuit affirmed that the regulation banning the Appellant's crèche from the town of Lexington's Battle Green was motivated in response to citizens who opposed the display. "There is no question in the present case that the opposition to the crèche motivated the amendment to the regulation." Pet. App. (hereinafter, App.) at 55a-56a.[1] This fact is undisputed. It was not, as Respondents argue, that the town was merely reacting to a likelihood of damage to the Green. Rather, it was "opposition to the crèche" (speech) that motivated the regulation, having nothing to do with aesthetics. The record below amply supports the Appellant's position on this point. The Appellee's opposition has no support in the record.

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[1] The Magistrate, in the Report and Recommendations on Cross Motions for Summary Judgment, App. p. 27a stated "there was no evidence of an attempt to suppress the message of the crèche or that the message was treated differently than any other message which may have been deemed less controversial." App. p. 56a. The message of the crèche, however, is obvious: It is the depiction of the birth of Jesus Christ, a core belief of Christianity. The District Court found it was "opposition to the crèche" that motivated the amendment. Even if the town had no animus toward the crèche, selectmen reacted to the opposition of town residents who did. This amounted to a ratification of a heckler's veto.

Because it was a heckler's veto, it cannot be viewed as content neutral regulation. *Graynard* v. *City of Rockford*, 408 U.S. 104, 117 (1972); *Forsyth County Georgia* v. *National Socialist Movement*, 505 U.S. 123, 130-134 (1992) and cases cited in Pet. for Cert. pp. 10, 15.

II. THE RESPONDENTS CONTINUE TO RELY UPON THE POST HOC RATIONALIZATIONS CONTAINED IN THEIR POST COMPLAINT AFFIDAVITS. THE ASSERTIONS CONTAINED IN THOSE AFFIDAVITS CONTINUE TO BE INVOKED BY THE TOWN AS THE BASIS FOR THEIR REGULATION WITH NO SUPPORT IN THE RECORD.

The issue of whether the display of the crèche was aesthetically damaging or inconsistent with the Green's history was addressed by the Magistrate.

> Plaintiffs do, with justification, take exception to the fact that the defendants are now arguing that the presence of any unattended expressive structure on the Green is incompatible with its historic use and destroys its aesthetic value. See e.g. Enrich Aff. at ¶¶ 31-34; Kreiger Aff. at ¶¶ 6, 7. Since the crèche has been displayed on the Green for 80 years, it is difficult to give credence to the defendants' present description of the

> harm that is likely to occur if the display is allowed to continue.

App. at p. 60a.

The Magistrate's finding that the crèche would no longer be the sole unattended structure on the Green, and that the placement of additional unattended structures would be inconsistent with the aesthetic and historic usage is surmise and conjecture. The fact is Lexington Green is a robust public forum as acknowledged by the Respondents themselves. Res. Br. in Opp. p. 2(b). The Green is a traditional public forum. App. p. 7a.

Petitioners note that the very affidavits of town officials invoking concerns of aesthetic damage caused by prospective applicants were not viewed seriously by town officials. See Pet. p. 7 *fn* 5. Respondents themselves acknowledge in their Br. in Opp: "[t]he Board understood that some or all of these potential applications were not serious, and that the prospective applicants had no desire actually to erect structures on the Green." Br. in Opp. p. 6(4).

The rationalization offered by Respondents that "the Board realized that if it granted a permit for the crèche, it also would be required to permit these other displays on the Green." contradicts the acknowledgement that the "prospective" displays "were not serious" and that the prospective applicants, "had no desire actually to erect structures." *Id.* These contradictory conclusions dem-

onstrate the tenuous and fragile legitimacy of the regulation.

If prospective applicants approached the town with a proposal to erect a two and a half ton, 27 foot high, 27 foot wide Menorah with a permanent foundation, as was the case in *American Jewish Congress* v. *City of Beverly Hills*, 90 F. 3d 379 (9th Cir. 1996) or other huts and structures on the Green, an assessment could be made as to any likely physical damage to occur on a case by case basis, consistent with time, place and manner doctrines.

III. MISAPPLICATION OF THIS COURT'S CAPITOL SQUARE DECISION.

Analyzing this Court ruling in *Capitol Square Review & Advisory Board* v. *Pinette*, 515 U.S. 753, (1995) the First Circuit Court of Appeals concluded that a ban on all unattended structures in a traditional public forum would "pass constitutional muster." App. p. 11a. Respondents restate the lower court's ruling in this regard as follows: "Indeed, as a majority of this Court and various courts of appeals already recognized, a content-neutral ban on all unattended structures is an inherently reasonable time, place and manner restriction." Br. in Opp. p. 12. Petitioners addressed this issue in Pet. p. 13 *fn* 6. More needs to be said.

The Court of Appeals cites to three cases that are not at all clear as to their import. The Ninth

Circuit in *American Jewish Congress* v. *City of Beverly Hills*, 90 F. 3d 379, 384 (9th Cir. 1996) said "[t]he city council could ban all unattended private structures in its parks." *Id.* at 384. It then cited to Justice Souter's concurring opinion in Capitol Square stating, "Ohio could ban all unattended private displays in Capitol Square if it so desired." Petitioner's position is that Capitol Square was not a traditional public forum. Lexington Green is. The First Circuit then cited to Congregation *Lubavich* v. *City of Cincinnati*, 923 F. 2d 458, 460 (6th Cir. 1991). The Cincinnati case is informative but not on point. In Cincinnati the Sixth Circuit allowed the placement of a free standing Menorah and noted in *dicta* that a case "arguably" could be made that a ban on all displays might be permissible. Lastly, the First Circuit cited to *Lubavich Chabad House, Inc.* v. *City of Chicago*, 917 F. 2d 341, 347 (7th Cir. 1990) as standing for a similar proposition. The Chabad House case was not a public forum case. The Seventh Circuit case referred to designated public spaces at O'Hare International Airport. The purpose of the regulation was to prohibit obstructions. "The language of the regulation itself articulates the significant governmental interest involved — the interest in prohibiting obstructions to the use of the airport or interference with airport operations." *Id.* at 346. The case was decided on discriminatory grounds.

Interestingly, in one case cited by Respondents in their Br. in Opp. p. 12, *Wells* v. *City and County of Denver*, 257 F. 3d 1132, 1149, 1150 (10th Cir.

2001) the Tenth Circuit in Wells seemed to distance itself from the broad interpretation of Capitol Square given by the First Circuit. The Tenth Circuit saw the language in Capitol Square as "*dicta*" *Id.* It noted that "[t]he relevant language in Justice Scalia's majority opinion — joined, in pertinent part, by six other justices — hypothesized that an unattended display ban "might be" an example of a valid, time, place and manner restriction."

IV. ALTERNATIVE SITES TO DISPLAY THE CRÈCHE AND OFFERS TO ASSEMBLE AND DISASSEMBLE THE CRÈCHE ON THE GREEN DAILY AFTER EIGHT HOURS, FOR ALL PRACTICAL PURPOSES, MAKES SPEECH IMPRACTICAL.

The First Circuit ruled that the regulation did not "unduly restrict the Knight's free speech rights because they have adequate alternative avenues of communication available to them [citation] the Knights remain free to display the crèche, either during the course of an event on the Green or at any time on nearby private property." App. p. 12a (D).

The effect of the regulation accomplished its purpose: In 2000 and 2001, after an eighty-year period where the crèche was displayed on Lexington Green, the crèche did not appear. Not only did opponents of the crèche win, but town officials didn't have to deal with the issue of so called "competing structures". This was truly a sad and

frustrating day in the history of the First Amendment in Massachusetts. Advising the Knights to go elsewhere and exercise their rights, however, is not a proper grounds to ban expressive activity, for "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *New Jersey*, 308 U.S. 147, 163 (193[illegible] Moreover, this Court has recognized that the specific place where a message is communicated may be important to the message and, consequently, of constitutional significance itself. *See City of Ladue* v. *Gilleo*, 512 U.S. 43, 56 (1994) (right to display expressive sign on residential property). Not only may the location be an essential part of the message sought to be conveyed, but it may also be essential to communicating with the intended audience. *See, Nationalist Movement* v. *City of Boston*, 12 F. Supp. 2d 182 (D. Mass. 1998).

V. THE NEED FOR A PER SE RULING FROM THIS COURT IS IMPERATIVE.

This case demonstrates why a per se ruling is so necessary from this Court. Petitioners have found very few cases, in their extensive review of case law, where private unattended structures are anything other than Christmas Holiday displays, nativity displays, or the display of Jewish Menorahs. While Respondents alluded to a series of proposed frivolous uses of the Lexington Green by opponents of the crèche, the Respondents' own

affidavits viewed most if not all of the request as unlikely to materialize.

The First Circuit, using the language of Capitol Square, invoked content neutrality to deal with the problem of the crèche, but the motive for the regulation, however nuanced, was clear as found by the Magistrate: "opposition to the crèche motivated the amendment to the regulations." *Supra.* This is not content neutrality. Other governmental entities by invoking this "content neutral" application of Capitol Square, combining it with other doctrines relating to regulation of speech and expressive activity in traditional public forums can now in a "content neutral" manner eliminate religious expression as was done here, as well as parades, processions, assemblies, displays, demonstrations, reenactments, vigils and services to name but a few.

CONCLUSION

The strictest of scrutiny must be applied to any governmental regulation of private speech and expressive activity in a traditional public forum.

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